

2011

Union Pacific Railroad v. Utah Department of Transportation; Utah Public Service Commission, Anderson Geneva Development Inc.; and Town of Vineyard : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

UNION PACIFIC RAILROAD,

Petitioner,

v.

UTAH DEPARTMENT OF
TRANSPORTATION; UTAH
PUBLIC SERVICE COMMISSION,
ANDERSON GENEVA
DEVELOPMENT, INC.; and
TOWN OF VINEYARD,

Respondents.

No. 20110326-SC
PSC Docket No. 09-888-01

On Petition for Review of
Agency Action of the
Utah Public Service Commission

BRIEF OF RESPONDENT ANDERSON GENEVA DEVELOPMENT, INC.

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Jurisdiction

This court has jurisdiction over Union Pacific's petition for review of agency action under Utah Code sections 63G-4-401 and 78A-3-102(3)(e)(i).

Statement of the Issues and Standards of Review

This appeal involves a challenge to the Public Service Commission's decision affirming the Utah Department of Transportation ("UDOT") classification of a railroad crossing and connecting road as public. Utah Code section 54-4-15 provides UDOT with authority to classify a railroad crossing as public when the railroad tracks cross a "public road or highway."

UDOT classified as public a railroad crossing over Union Pacific's right of way located where Vineyard Road crosses 400 North in Vineyard, Utah. (R. 1004 at Ex. 16.) The Commission reviewed UDOT's classification and, after extensive hearings, affirmed based upon several factors: (i) the nature and use of the crossing; (ii) the engineering standards applicable to such crossings; (iii) the parties' stipulation that the crossing was public as of 1942; and (iv) lack of evidence that the public crossing was vacated after 1942. (R. 947-72.)¹

In this court, Union Pacific challenges the Commission's decision on the ground that the location of the current road may not match perfectly, but does overlap substantially, the location of the road in 1942. (AOB at 11-12.) Union Pacific argues that when the road moved to its current location, it never *became* public through dedication or otherwise. Before the Commission, Union Pacific's

¹ A copy of the Commission's final Report and Order is at Addendum A.

argument was different: the road shifted and those parts of the original public right of way that the current road and crossing no longer cover did not *remain* public because they were not used after the shift. (R. 825-26.) More specifically, before the Commission, Union Pacific argued that, after the road moved, public use of the original right of way was abandoned. (*Id.*) That argument mistakenly presumes that a public right of way is abandoned by interrupted use. Now recognizing the problems with that position, in its opening brief Union Pacific argues that the road in its current location—or at least parts of it—never became public, an argument concerning how a right of way is acquired.

Issue 1: Whether an issue raised for the first time on appeal has been preserved, where the new argument resembles one made before the Commission but its differences give rise to different defenses that were not raised before the Commission because the precise arguments were not raised.

Standard of Review: Except when reviewing a decision of the court of appeals, this court must address preservation in the first instance, which requires application of the law of preservation to the proceedings reflected in the record. *O'Dea v. Olea*, 2009 UT 46, ¶¶ 15-27, 217 P.3d 704.

The Commission lacked evidence to decide among three possibilities concerning the relationship between the current road and the original right of way in 1942. (R. 826.) First, it is unclear whether the road or right of way, or both, moved because there was no “evidence showing precisely where the road actually was [in 1942].” (R. 953.) Second, if the road did move, it may have

shifted naturally, something witnesses testified “would not be uncommon.”

(R. 952-53.) Third, the road may have moved when the crossing was reconfigured for safety purposes, but there was insufficient evidence to determine whether anyone other than Union Pacific moved it. (R. 952.)

In the opening brief, Union Pacific cites legal authority standing for the proposition that when one in possession of a right of way moves a road to a different location, the right of way does not move automatically with the road. Union Pacific then assumes that the Commission found the road was moved by someone other than Union Pacific. But the Commission made no such finding. Instead, the Commission lacked sufficient evidence to determine the relationship between the current road and the original public right of way. (R. 953, 962-63.) The Commission then concluded that, regardless of whether or how the road became misaligned with the original right of way, the right of way was not abandoned, making the stipulated public nature of the road in 1942 determinative of its current status. (R. 962-64.)

Issue 2: Whether the Commission acted unreasonably in affirming UDOT’s classification of the crossing as public.

Standard of Review: Union Pacific attempts to gain a more favorable standard of review by implying that if UDOT incorrectly determined that the crossing was public, then UDOT lacked jurisdiction in the first place. (AOB at 1-2.) For reasons addressed in the merits section of this brief, this court should reject Union Pacific’s characterization of the issue as one of jurisdiction.

This court reviews an agency's decision in light of the agency's expertise, familiarity with and authority over its rules, and superior ability to make factual determinations. For those reasons, "where the legislature has granted discretion to an agency to interpret the statutory provision at issue, [this court] will affirm the agency's interpretation if it is reasonable." *LPI Servs. v. McGee*, 2009 UT 41, ¶ 7, 215 P.3d 135, 138. Similarly, the court will uphold an agency's interpretation of its own rule, or a departure from that rule, if the agency's action is "reasonable and rational." *Union Pac. R.R. Co. v. Auditing Div. of Utah State Tax Comm'n*, 842 P.2d 876, 879 (Utah 1992). Where a question of law falls outside those areas, the court will review the Commission's interpretation of general law for correctness. *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 667 (Utah 1991).

With respect to factual determinations, the Commission's conclusion on a mixed question of fact and law should be upheld as long as it falls "within the bounds of reasonableness and rationality." *Id.* And its determinations of basic fact should be overturned only if they are "not supported by any evidence of substance whatsoever." *Id.* In evaluating whether the Commission's findings are supported by evidence, the court should examine the "whole administrative record," and should reverse only if the party challenging the facts "marshal[s] all of the evidence supporting the findings and show[s] that despite the supporting facts, the . . . findings are not supported by substantial evidence." *Assoc. Gen. Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112, ¶ 32, 38 P.3d 291 (internal quotation marks omitted); *see also* Utah Code § 63G-4-403(4)(g).

Determinative Provisions

The following determinative provisions are attached at Addendum B:

Utah Code § 54-4-15

Utah Code § 72-3-108

Utah Code § 72-5-104

Utah Code § 72-5-105

Statement of the Case

I. Nature of the Case

This case involves UDOT's determination that a railroad crossing and adjoining road are public and, therefore, subject to UDOT regulation for safety. In this appeal, Union Pacific challenges the reasonableness of the Public Service Commission's determination that UDOT acted reasonably in designating the road, and therefore the crossing, as public.

II. Course of Proceedings

In conjunction with UTA's construction of a Frontrunner train line from Salt Lake City to Provo, UDOT reviewed the status of the roads that would cross the new Frontrunner route. (R. 1004 at Ex. 10.) In Utah County, UDOT identified more than twenty such crossings, including one identified as "Geneva Road, 4000 North" in Vineyard. (*Id.*) UDOT later published notice that the crossing was scheduled to be closed. (*Id.* at Exs. 11-15.)

Anderson Geneva and the Town of Vineyard then realized that UDOT intended to close the crossing at 400 North Vineyard Road, not 4000 North Geneva Road, as the notice had indicated. (*Id.*) They met with UDOT to provide information related to the crossing and petitioned the Commission to review UDOT's determination. (*Id.*) Subsequently, based upon information provided by Anderson Geneva and Vineyard, UDOT (i) determined that the crossing was, in fact, public; and (ii) agreed to conduct a surveillance review of the crossing. (*Id.* at Ex. 15.) UDOT later reaffirmed its decision, stating that, "[a]fter reviewing

the documents and pertinent information, UDOT classifies this Crossing as a public crossing.” (*Id.* at Ex. 16.) Then, in conjunction with reaffirming the crossing’s public status, UDOT ordered its temporary closure. (*Id.*)

Union Pacific petitioned the Commission for review of UDOT’s classification of the crossing as public. (R. 1-3.) With the Commission’s permission, Anderson Geneva and Vineyard intervened and petitioned the Commission to review UDOT’s decision to close the crossing. (R. 27-38; 61-84.) After extensive discovery and pre-hearing briefing by Union Pacific, UDOT, Anderson Geneva, and Vineyard, the Commission held hearings for two days in August 2010. (R. 1001-1002.) Based on the parties’ briefing and the evidence adduced at those hearings, the Commission granted the relief requested by Anderson Geneva and Vineyard on the ground that UDOT had not followed its own procedures² in ordering a temporary closure of the crossing. (R. 966-70.) No party has challenged the Commission’s reversal of that aspect of UDOT’s decision, so it is not at issue here.

The Commission denied Union Pacific’s request to overturn UDOT’s classification of the crossing as public. (R. 956-66.) The Commission examined the engineering standards that UDOT considers when classifying a crossing as public or private and concluded that, in the circumstances here, those standards

² Those procedures include providing notice of the intent to close a crossing, conducting a surveillance review, and taking input from the public and the diagnostic team that conducted the surveillance review. (R. 966-70.) The Commission concluded that none of those procedures were followed and UDOT lacked any reasonable and rational basis for departing from its own rules. (*Id.*)

supported UDOT's determination that the crossing is public. (R. 964-66.) The Commission also examined the legal status of the crossing over time and found substantial evidence to support classifying the crossing as public. (R. 960-64.) That evidence included a stipulation from the parties that the crossing and road leading into it were dedicated as public in 1942 and that no formal action has been taken since that time to vacate the road or crossing. (R. 961.)

Union Pacific filed a motion for rehearing, raising for the first time a new argument. Prior to the Commission's decision, Union Pacific argued that "there is no dispute that UDOT has the jurisdiction and authority to decide whether the [crossing] is public or private." (R. 877.) But after the Commission entered its order, Union Pacific argued that UDOT lacked jurisdiction to classify the crossing as public. (R. 980-82.) Union Pacific's new position was based on language in the Commission's order suggesting that the road may have moved over time so that portions of the crossing are no longer within the original public right of way. (*Id.*) The Commission did not issue any order considering Union Pacific's new argument, so the motion for rehearing was deemed denied by operation of Utah Code section 63G-4-302(3)(b).

Union Pacific filed a petition for review with this court. In its opening brief, Union Pacific raised only the question raised for the first time in its motion for rehearing: "Is the railroad-highway grade crossing at approximately 400 North Street, Vineyard, Utah, a private crossing that is not subject to the jurisdiction of the Utah Department of Transportation?" (AOB at 1.)

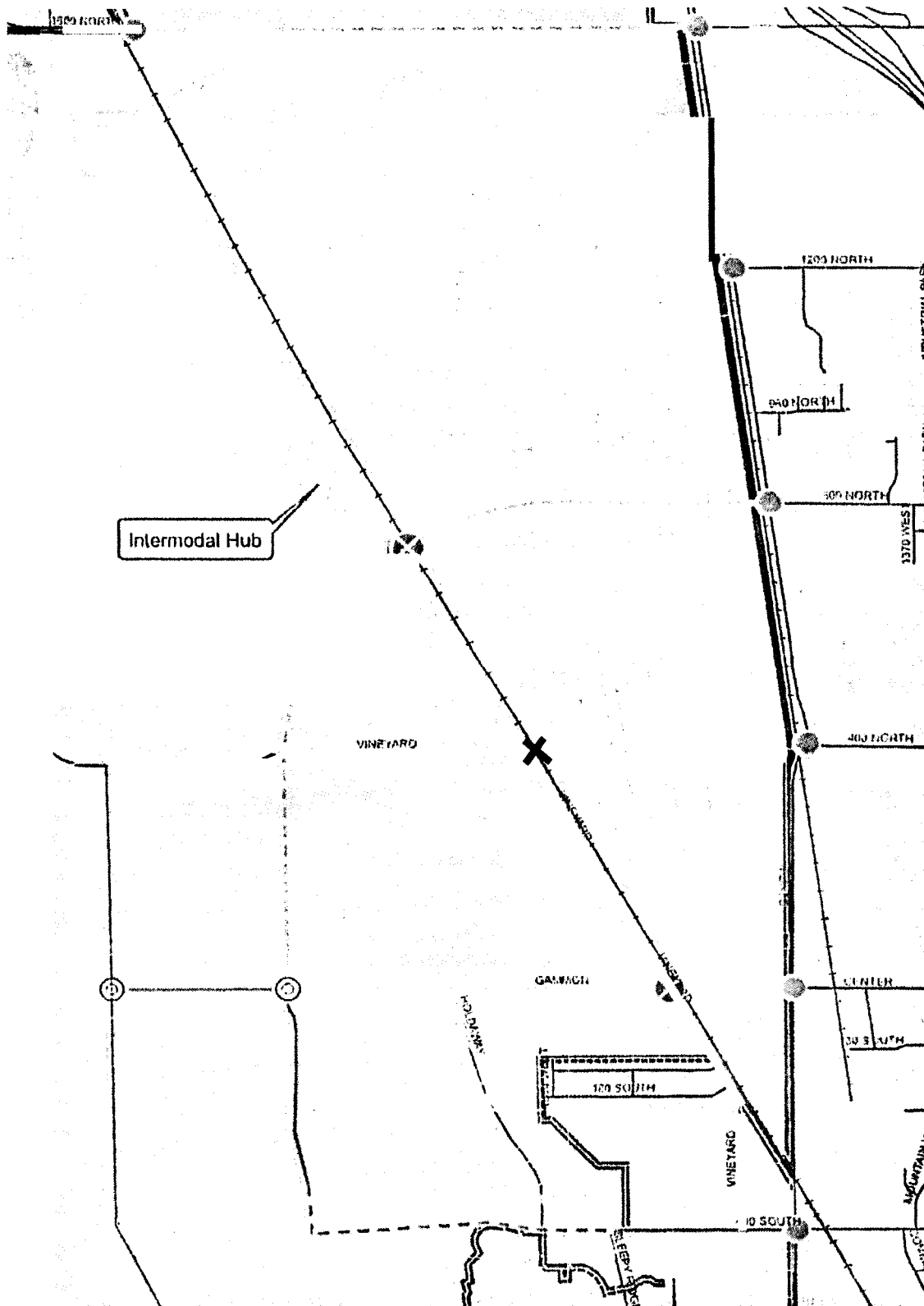
III. Statement of Facts

A. Description of the Crossing

The crossing is located where Vineyard Road intersects, and for a short distance joins, 400 North. (R. 1003 at Ex. 139.) From the north, Vineyard Road begins at approximately 1600 North, where it travels for a short distance west, until it reaches Utah Lake. It then runs parallel to Utah Lake for approximately 1.5 miles, where it joins 400 North. The two roads then turn east and merge for approximately one mile. At the end of that one-mile stretch, the road leads to Union Pacific's railroad tracks at a three-way intersection. Straight ahead (to the east) is the crossing.

Past the crossing, the road turns northeast and enters Anderson Geneva property. Before the crossing, Vineyard Road bends to the right (southeast) and continues for approximately one more mile before it terminates at an intersection with 400 South. For most of that mile between 400 North and 400 South, Vineyard Road roughly parallels the western edge of Union Pacific's right of way and railroad tracks. Because the tracks and one portion of the road run from northwest to southeast, while the other portion of the road runs east to west, the roads do not intersect at right angles. Instead the angles are roughly 45 degrees or 135 degrees, depending on the approach.³

³ The map inserted below appears in the record as one of Union Pacific's exhibits. (R. 1003 at Ex. 39.) For the court's ease of use, counsel has added yellow highlighting to identify Vineyard Road and has placed an X on the crossing. An unaltered version of this exhibit is attached to this brief as Addendum C.



B. The Parties Stipulate the Crossing Was Public in 1942

Before the Commission, the parties stipulated that the crossing was public in 1942. (R. 948 & n.5; 1001:14.) The crossing was likely in place by 1881, when Union Pacific's predecessor obtained its railroad right of way, or the 1920s, when the crossing began to appear on maps of the area. (R. 526, 554, 949-50.)

In 1942, various landowners transferred title of large tracts of land to the Defense Plant Corporation, which constructed a steel plant that ultimately became Geneva Steel Company. (R. 948-49.) Anderson Geneva has purchased Geneva Steel's land, including the land on the east side of the crossing. (R. 947.) On the west side of the crossing, to the north, the land transferred to the Defense Plant Corporation, and later Anderson Geneva, extends west toward Utah Lake and past the railroad right of way. (R. 948-50; 1003 at Ex. 137.) On the east side of the crossing, the Geneva land extends both north and south, bordering the railroad right of way to the west and Geneva Road to the east. Utah County, in aid of the Defense Plant Corporation project, abandoned and vacated all roads lying within the boundaries of the Geneva property, including the road that ran east from the railroad right of way to Geneva Road. (R. 1004 at Ex. 8.) When the County vacated the land east of the crossing, 400 North ran not only west of the crossing toward Utah Lake, but also east of the crossing toward Orem. (R. 948.) Accordingly, a portion of 400 North running from the east boundary of the Union Pacific right of way at the crossing and running east toward Orem was vacated and transferred to the Defense Plant Corporation. (*Id.*)

At the hearing before the Commission, counsel for Union Pacific asked, "I will ask counsel to correct me if I get this wrong, but I believe that the parties have stipulated that prior to the 1942 action by the county commission that we agree that this was a public road and a public crossing." (R. 1001:14.) Counsel for Anderson Geneva replied affirmatively, "Yes." (*Id.*) The Commission accepted that stipulation. (R. 948 & n.5.)

After the crossing became public, the area lying within the Union Pacific right of way and connected to Vineyard Road on the west was never formally vacated. As the Commission found, the County Action in 1942 that vacated certain surrounding land did not vacate the road and crossing. (R. 949.) The Commission's finding was based on testimony from four witnesses – two of which were Union Pacific witnesses – that the county road and crossing were not vacated when all roads within the Geneva land was vacated. (*Id.*)

C. The Crossing Remains Public After 1942

The crossing's public road status has not changed since it was established. As mentioned, no public entity has ever taken any action to vacate the public road which comprised the crossing. (R. 961.) The Commission found that, under the Utah Code, that fact alone is determinative of whether it retains its public status. Utah Code section 72-5-105(1) states, "[a]ll public highways, streets, or roads once established shall continue . . . until formally abandoned or vacated by written order, resolution, or ordinance resolution of a highway authority having jurisdiction or by court decree"

Before the Commission, Union Pacific argued that the road became private through diminished use over time. (R. 826.) In other words, the issue involved how a public road could become private, not how a private road could become public. Union Pacific's arguments led the Commission to examine how the road was classified and used after 1942. (R. 961-64.)

The Commission found that the public nature of the road and crossing did not change, despite its private use within the Geneva land. In 1943, Union Pacific's predecessor sought permission from the Commission to upgrade the railroad tracks at the crossing. (R. 950.) In its application, it recognized the crossing as public. (*Id.*) The State also classified it as public at that time. (R. 951.) Union Pacific later petitioned the Commission for a new line near the crossing, and Union Pacific's application again classified the crossing as public. (*Id.*) And until 2008, the Federal Railroad Administration database classified the crossing as public based upon information provided by railroads, like Union Pacific, and state agencies, like UDOT. When the classification in the FRA database was changed to private in 2009, it was due solely to the act of Union Pacific.

Vineyard considers the road and crossing as public. (R. 965.) Vineyard has relied on the public designation of the road and crossing in its master plans, leading the Commission to find that "Vineyard continues to accept the Crossing as public." (R. 951; 965.)

The Commission also heard evidence concerning the use of the crossing in recent years. For the years when the steel mill operated on land east of the

crossing, a gate on the east side of the crossing controlled access. (R. 1002:404.) During that time, until the steel mill was closed about a decade ago, an FRA report indicated that approximately 3,700 vehicles per day traveled over the crossing. (R. 352-53.) Mr. Grover, an engineer for Anderson Geneva and a former Utah County commissioner, testified that during the years he worked at the steel mill, the FRA's 3,700 vehicles-per-day figure was a fair estimate. (*Id.*)

D. The Crossing May Have Been Reconfigured in 1972

The road and crossing may or may not have moved over time. The Commission lacked evidence to conclude whether or how far they moved, ultimately finding that “[t]here is no conclusive evidence that the road—as it currently exists—is how it was at the time of the 1942 Resolution.” (R. 953.) If the road and crossing moved at all, there is some evidence that they moved in the early 1970s in conjunction with the crossing being reconfigured for safety reasons. (R. 951-52.) The Commission heard evidence that a fatality at the crossing prompted Utah County, Union Pacific, and the predecessor to Geneva Steel to redesign the crossing to change the angle of approach.⁴ (*Id.*)

While the original proposal was to move the crossing 600 feet north, the crossing was not moved nearly that far, if it was moved at all. (R. 952.) For example, Mr. Marshall, one of Union Pacific's witnesses, testified that while he believed the crossing was reconfigured, the proposal to move the crossing was

⁴ Crossing angles of 90 degrees are preferred, because a driver crossing the tracks will have the best view in both directions. (R. 951-52; 1002:319.)

“more like a conversation,” which explained why there is no evidence UDOT was involved in the discussions. (R. 1001:134.) As Mr. Marshall stated, “a lot of the stuff they talked about had never — they never did do it. They never moved across the 600 feet from what we can tell.” (*Id.*) And if the crossing was reconfigured, the Commission concluded there was “insufficient evidence to determine whether the County was involved in the reconfiguration or whether it was solely reconfigured by the steel plant and the UPRR.” (R. 962.)

During the Commission hearings, there was substantial confusion about whether the road leading up to the crossing from the west changed location since 1942. Some witnesses testified that it had shifted north — perhaps because the crossing reconfiguration required moving the road as well, or perhaps because the location of a road can naturally shift over time. (R. 1002:42, 241.) The Commission concluded that the road may have moved over time, but to the extent it did, the road overlaps with its original location. (R. 962.) The Commission heard evidence that the road was only fifty feet wide in its earlier configuration, which means that — if the Road overlaps with its original location — it could not have shifted more than twenty-five feet. (R. 950.) Because of the original road’s proximity to the land that was vacated, that shift also means that some portion of the road, in its present location, may be on land that became private when it was transferred to the Defense Plant Corporation in 1942. (R. 951.)

E. The Commission Upholds UDOT's Classification of the Crossing as Public

In 2008, UDOT classified the crossing as private on two central grounds:

(i) a closed and locked gate prevented the public from crossing the tracks to enter Anderson Geneva property; and (ii) engineering standards indicate that, as a general rule, crossings are private where one of the roads leading into the crossing is private. (R. 1002:127; 164-65.) Here, the road on the east side of the crossing leads into Anderson Geneva's private property. UDOT later reconsidered those factors and changed its initial characterization based on information it reviewed after Anderson Geneva and Vineyard were made aware of UDOT's evaluation of the crossing. (R. 1003 at Ex. 124.)

The Commission agreed with UDOT's later determination that those factors, standing alone, did not require that the crossing be designated as private. Engineering standards permit classification of crossings as public when only one of the roads leading into a crossing is public. (R. 965.) More important, those same standards rely on state and local determinations of whether a crossing is public. (*Id.*) One such standard indicates that, if a local government considers the crossing to be public, as Vineyard does here, the crossing is public. (*Id.*) Confirming that, UDOT has also classified at least one other crossing as public even though the road on one side of the crossing is private. (*Id.*) The Commission also concluded that the temporary obstruction of the locked gate was not a sufficient basis under Utah law for concluding that the road and

crossing had been vacated – an act that requires formal action by the government entity that will be losing the road. (R. 964.)

At the time when the crossing's classification was presented to the Commission, UDOT had re-designated the crossing as public. In concluding that there was sufficient evidence to support that classification, the Commission relied on the parties' stipulation that the road and crossing were public as of 1942 and noted that Union Pacific had failed to prove that the public road then established had ever been vacated or that the road had moved so far as to be removed from the original dedicated road, such that the crossing is now private.

Summary of the Argument

The court should uphold the Commission's conclusion that UDOT properly classified the railroad crossing as public. Under Utah Code section 54-4-15(2), UDOT has authority to classify as public and maintain a railroad crossing where railroad tracks cross "a public road or highway." Union Pacific contends that the crossing is not public because the crossing or the road leading to it may have deviated from the original public right of way.

In its opening brief, Union Pacific asserts that the standard of review is correctness on the basis that the issue on appeal is whether UDOT had jurisdiction to determine whether the crossing was public. (AOB at 1-2.) Union Pacific confuses jurisdiction, which concerns the authority "to adjudicate a class of cases," with "the specifics of an individual case." *Johnson v. Johnson*, 2010 UT 28, ¶ 10, 234 P.3d 1100, 1102. UDOT has jurisdiction to determine the status of

railroad crossings in Utah, even though it may be incorrect about the specifics of an individual case. UDOT's jurisdiction is not at issue. The issue on appeal is whether the Commission erred in upholding UDOT's determination that the crossing is public. Resolution of that issue depends on application of the expertise of UDOT and the Commission, on facts found by those agencies, and on those agencies' interpretations of the law and rules they are empowered to administer. Thus, this court should review the Commission's decision for whether it exceeds the bounds of reasonableness and rationality.

Union Pacific also argues on appeal that after the road moved somewhat off of the original right of way, the current road never became public, an argument concerning public dedication. (AOB at 12-16.) Union Pacific did not adequately raise this argument before the Commission. Instead, Union Pacific argued that the right of way ceased to be public when it could not be used by the public after the road moved somewhat off the original right of way. (R. 826-27.) The first argument concerns how a private road becomes public; whereas the second argument concerns how a public road becomes private. The distinction is important because the standards for determining the scope of a right of way and how a right of way is created are quite different from the standards for determining how a right of way is abandoned. Because Union Pacific's new argument was not adequately presented to, nor considered by, the Commission, the argument is not preserved.

Union Pacific's new argument also fails on its merits. First, the parties stipulated that the road and crossing were public as of 1942. (R. 948.) Union Pacific also conceded that the road and crossing became public through "implied dedication," meaning that the right of way arose from public use of the road. (R. 826.) The only way the public could abandon its right of way is through formal abandonment, something that undisputedly never occurred here. (R. 961.) Therefore, the Commission's decision to affirm UDOT's classification of the crossing as public did not exceed the bounds of reasonableness and rationality.

Second, the road remained public regardless of whether it no longer aligned perfectly with the location of the road in 1942. Union Pacific argues that, where a road follows a right of way, a significant relocation of the road does not thereby relocate the right of way. (AOB at 9-10.) But that principle has no application here. The Commission did not find that the road was relocated because it lacked sufficient evidence to determine whether the road had moved at all or, if it did move, whether it naturally shifted over time or was deliberately relocated. (R. 951-53.) And even assuming the road was deliberately relocated, the Commission did not find that someone other than Union Pacific relocated the road. (R. 952.) For the same reason that a party possessing a right of way may not unilaterally relocate the right of way by moving the road, a land owner may not extinguish another's right of way by unilaterally moving a road or acquiescing to the move.

Third, the scope of the original right of way was not confined to the contours of the original road, so the road's movement is beside the point. Under Utah law, the scope of a right of way "is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances." Utah Code § 72-5-104(8). The only evidence of why the road was relocated – if it was relocated – is that after a fatal accident at the crossing in the early 1970s, the road was reconfigured for safety reasons. If the road required reconfiguration "to ensure safe travel," then it was relocated within the scope of the right of way. *Id.*

Fourth, the entire discussion of whether the road shifted is beside the point. The determination of whether the crossing is public requires only that the road be public. It does not require that the public right of way accompanying that road be or remain a certain width. While there is evidence that the road may have moved, for the public nature of the road to be extinguished, the road must have moved entirely off of the original right of way. There is no such finding here. Therefore, Union Pacific's arguments, even if correct, would not demonstrate that the road is private.

The Commission did not exceed the bounds of reasonableness in affirming UDOT's determination that the crossing is public. This court should affirm.

Argument

UDOT acted within the scope of its authority and discretion in concluding that the crossing is public, and the Commission acted reasonably in affirming UDOT's determination. UDOT has statutory authority to classify railroad crossings as public and then to manage the safety of those crossings. Here, UDOT exercised its authority in determining that the Union Pacific crossing is public. The Commission affirmed UDOT's classification.

On appeal, Union Pacific argues that the road leading to the crossing no longer aligns perfectly with the original public right of way, and, therefore, the current road never became public. Union Pacific then frames its argument on appeal as a question of jurisdiction and argues that UDOT lacked jurisdiction to determine the public/private status of the crossing in the first place. Union Pacific appears to frame the issue in terms of jurisdiction to obtain a more favorable correctness standard of review and avoid the deference that this court affords the Commission and UDOT when those agencies have undertaken a factual inquiry and interpreted issues of special law.

As demonstrated below, this court should reject those arguments. First, the issues raised in the opening brief do not implicate UDOT's jurisdiction, leaving correctness review inappropriate. Instead, this court should review the Commission's decision to determine whether it was reasonable and rational. Second, the argument in the opening brief was not presented to the Commission,

leaving it unpreserved. Finally, Union Pacific's new argument fails on its merits for a number of reasons. This court should affirm.

I. UDOT Had Jurisdiction to Determine Whether the Crossing Was Public So This Court's Standard of Review Is Not Correctness

In the opening brief, Union Pacific frames the issue as whether UDOT had "jurisdiction" to determine whether the crossing was public, asserting that "UDOT cannot assert jurisdiction over this railroad crossing because it is located on Union Pacific's private right of way." (AOB at 1, 19.) Union Pacific could mean two different things in framing its issue as involving UDOT's jurisdiction.

At the end of its brief, Union Pacific appears to mean only that, if it prevails on the merits and convinces this court that UDOT and the Commission both acted unreasonably in classifying the crossing as public, then any authority UDOT had to impose safety regulations over the crossing ceases. (AOB at 19.) If that is what Union Pacific means, then its assertion that UDOT lacked "jurisdiction" merely restates its position that the crossing should have been classified as private, not public. Assuming that is what Union Pacific means, then its use of the word "jurisdiction" does not alter the standard of review.

At the beginning of the brief, however, Union Pacific appears to mean that, because the crossing is private, UDOT had no authority in the first place to determine whether the crossing was public. Union Pacific asserts that the standard of review is correctness because the court must review whether UDOT

had jurisdiction to determine whether the crossing was public. (AOB at 1-2.) If that is what Union Pacific means, then it is incorrect for a number of reasons.

First, Union Pacific confuses jurisdiction, which concerns the authority “to adjudicate a class of cases,” with “the specifics of an individual case.” *Johnson*, 2010 UT 28, ¶ 10. UDOT has jurisdiction by statute to determine the status of railroad crossings in Utah. Utah Code Ann. § 54-4-15. Like any entity with authority to adjudicate a class of cases, it might decide a particular case incorrectly, but that does not mean it lacked authority to resolve the issue in the first instance. Here, Union Pacific challenges UDOT’s determination that a particular crossing is public. Jurisdiction is not at issue.

Second, Union Pacific’s argument concerning jurisdiction—even if it were correct—does not affect the subject matter jurisdiction of either the Commission or this court. Union Pacific frames the issue on appeal in jurisdictional terms to argue for a more favorable standard of review. But it expressly asks this court to declare the crossing private, something the court would lack authority to do if it lacked subject matter jurisdiction. (AOB at 20.)

Because Union Pacific’s challenge is not a challenge to subject matter jurisdiction that may be raised at any time, its argument that UDOT lacked authority must have been raised before the Commission in order for this court to consider it. Yet before the Commission, Union Pacific represented that “[t]here is no dispute that UDOT has the jurisdiction and authority to decide whether the Crossing is public or private.” (R. 877.) If the Commission erred in interpreting

the scope of UDOT's authority to include classifying the crossing as public, that error was invited by Union Pacific.⁵ This court should reject Union Pacific's invitation to review the Commission's decision for correctness.

Instead, this court should review the Commission's decision for whether it was reasonable and rational. This court reviews an agency's decision in light of the agency's expertise, familiarity with and authority over its own rules, and superior ability to make factual determinations. For those reasons, "where the legislature has granted discretion to an agency to interpret the statutory provision at issue, [this court] will affirm the agency's interpretation if it is reasonable." *LPI Servs. v. McGee*, 2009 UT 41, ¶ 7, 215 P.3d 135, 138. Similarly, the court will uphold an agency's interpretation of its own rule, or a departure from that rule, if the agency's action is "reasonable and rational." *Union Pac. R.R. Co. v. Auditing Div. of Utah State Tax Comm'n*, 842 P.2d 876, 879 (Utah 1992). And the court upholds mixed questions of fact and law as long as they fall "within the bounds of reasonableness and rationality." *Id.*

In this case, Union Pacific challenges the Commission's decision affirming UDOT's determination that the crossing was public. That decision involves

⁵ "[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (quoting *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996)). An error is also invited when "counsel, either by statement or act, affirmatively represented to the court that he or she ha[s] no objection." *Id.* (quoting *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111). This court will not reach invited errors, even where the errors are plain. *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 26, 226 P.3d 719. This court applies the same standards for invited error whether it is reviewing the decisions of a court or an agency. *Id.* ¶ 26.

UDOT's interpretation of Utah Code section 54-4-15(2), which allows UDOT to "determine and prescribe the manner" of safety regulations at public railroad crossings described in the statute. As the Commission recognized, under section 54-4-15 "UDOT has an implied grant of authority necessary to carry out its duties, that is, to determine whether a crossing is public or private in the first place." (R. 957.) UDOT then interpreted that section in light of its own procedures and methods to classify the crossing as public.

And that classification presents a mixed question of fact and law, requiring UDOT and the Commission to apply those standards to the facts found below. To the extent Union Pacific frames this as a legal issue, it has disregarded its obligation to marshal the evidence supporting the Commission's factual findings. *Chen v. Stewart*, 2004 UT 82, ¶ 20, 100 P.3d 1177. This court should accordingly take all the facts found by the Commission as true for purposes of this appeal. *United Park City Mines Co. v. Stitching Mayflower Mountain Fonds*, 2006 UT 35, ¶ 25, 140 P.3d 1200 ("Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the [appellants] also have a duty to marshal the evidence. [Appellants] cannot dodge this duty by attempting to frame the issues as legal ones."). Similarly, because Union Pacific challenged UDOT's determination below, Union Pacific bore the burden of proving the facts necessary for the Commission to reverse UDOT's decision. To the extent the Commission's decision may rest on its inability to find facts—

one way or the other — Union Pacific failed to carry that burden. Union Pacific cannot now seek to overcome that failure by recasting the issues here as legal questions. *Webster v. Lehmer*, 742 P.2d 1203, 1207 (Utah 1987) (court will not “invade the province” of lower court to reverse when a party has failed to carry its burden below.)

The court should afford the Commission and UDOT the deference appropriate in these circumstances. It should reverse only if Union Pacific demonstrates that the Commission’s order exceeds the bounds of reason.

II. Union Pacific Did Not Preserve Its Argument That the Road Ceased to be Public Because It Moved and Never Became Public Again

In the opening brief, Union Pacific argues that because the road was relocated so that it is misaligned somewhat with the original right of way, the current road never became public. Union Pacific did not present that argument to the Commission, which rejected the argument Union Pacific did make: that the right of way ceased to be public when it could not be used by the public after the road had moved. (R. 962.) The argument is not preserved.

This court will not reach unpreserved claims. *State v. Pinder*, 2005 UT 15, ¶¶ 45-47, 114 P.3d 551. The purposes behind the preservation rule are to give the agency a meaningful opportunity to consider the issue before it resolves the parties’ dispute and to “prevent[] a party from avoiding the issue [below] for strategic reasons only to raise the issue on appeal if the strategy fails.”

Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 20, 163 P.3d 615. Importantly, to

ensure that the agency had an adequate opportunity to address the issue, this court requires that issues be raised in a timely and specific manner in order to be preserved for appellate review. *Id.* A general objection is insufficient to preserve specific arguments. *State v. Elm*, 808 P.2d 1097, 1099-1100 (Utah 1991).

Union Pacific has not preserved its argument that, regardless of the road's original status and use over time, once the road moved to a new location (if it did) it never became public. That specific argument was not presented to the Commission in Union Pacific's pre-hearing position statement or in its post-hearing filings; nor were the cases Union Pacific cites in its opening brief provided to the Commission.⁶ (R. 744; 762; 793; 818; 874; 915; 980.)

Instead, Union Pacific argued that if the crossing moved it "would have resulted in an interruption of the continuous use of the right of way." (R. 825.) While Union Pacific recognized its stipulation that the road was public in 1942, it claims that the public nature of the road was abandoned. (R. 825-26.) The Commission rejected that argument by noting that a right of way cannot be vacated by implication; it must be formally abandoned. (R. 960-61.)

⁶ Only one of the cases cited with respect to the scope of a right of way was cited below – *Okelberry* – and it was cited only for the proposition that, where a right of way has not been established, an overt act that interrupts public use of the potential right of way restarts the prescriptive period for establishing the right of way. Appellate counsel for Anderson Geneva have been unable to locate *Lindsay Land & Livestock Co. v. Churnos*, *Lund v. Wilcox*, *Vestal v. Young*, *Thurman v. Byram*, *Jennings Inv. v. Dixie Riding Club*, *Draper City v. Estate of Bernardo*, or *Petersen v. Combe* in any of Union Pacific's filings below. Union Pacific's filings before the Commission are attached to this brief as Addendum D.

The argument concerning whether the relocated road ever became public was not addressed by the Commission because it was not asked to address that argument. The argument was not preserved.

III. The Crossing Is Public Because No Formal Action Was Taken to Abandon the Right of Way and Because Any Shift in the Road's Location Did Not Eliminate Its Public Nature

On the merits, Union Pacific's only argument on appeal is that the current road never became public after the prior road was relocated to its current location. (AOB at 8-18.) In establishing the need for the current road to be rededicated after the relocation, Union Pacific cites cases for the proposition that a right of way does not automatically move with a road. (AOB at 9-10.)

Initially, it is worth noting that the Commission did not find that the road was relocated, but instead stated that it lacked sufficient evidence to determine "precisely where the road actually was at the time of the 1942 Resolution." (R. 952-53.) The road may, in fact, be in precisely the same location as it was when it became public through implied dedication. And if it has moved, Union Pacific failed to provide the Commission sufficient evidence to determine the extent of the move or its cause, including whether the road naturally shifted over time. (R. 952-53.) Union Pacific's argument fails for the same reason here.

But assuming the road was relocated, the cases cited in the opening brief actually support the Commission's conclusion that the road remained public. Union Pacific first quotes *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929), for the proposition that "the public cannot acquire a right by use to

pass over a tract of land generally, but only in a certain way.” That is a partial quote used to support Union Pacific’s claim that any “[d]eviations in the line of travel after dedication may change the identity of the road.” (AOB at 9.)

The full quote from *Churnos* demonstrates the opposite with respect to any minor adjustment in the location of the road in this case.

While the public cannot acquire a right by use to pass over a tract of land generally, but only in a certain line or way, it is not indispensable to the acquisition of the right that there should be no deviation in the use from a direct line of travel. If the travel has remained substantially unchanged, and *the practical identity of the road preserved*, it is sufficient, although there may have been slight deviations from the common way to avoid encroachments, obstacles, or obstructions upon the road.

Churnos, 285 P. at 649 (emphasis added). Here, the Commission could not find that the road had moved, let alone that it had moved so significantly as to extinguish the “practical identity of the road.” *Id.* *Churnos* supports the view that a reconfiguration for safety purposes did not extinguish the public right of way or require the establishment of a new one, especially where the reconfiguration amounts to a minor adjustment in the road. *Sullivan v. Condas*, 76 Utah 585, 290 P. 954, 957 (Utah 1930) (“Whatever change was made was slight and did not materially change or affect the general course of the highway or of its location nor break or change the continuity of travel or use.”).

Union Pacific also quotes extensively from *Lund v. Wilcox*, 97 P. 33, 35 (Utah 1908), calling it “strikingly similar” to this case. Union Pacific claims that *Lund* stands for the proposition that an “established right of way did not move

with the road, but remained in the location where it had been established.”

(AOB at 10.) But *Lund* could not stand for that proposition because no right of way was ever established in *Lund*. Instead, *Lund* stated that use of another’s land in two different locations cannot be combined to satisfy the prescriptive time for establishing a right of way in the first place. *Lund*, 97 P. at 35.

Again, the full quote from *Lund* demonstrates the point: “A prescriptive right of way cannot be acquired by tacking together two distinct periods of use of two separate ways, though one was abandoned for the other with the consent of the landowner, and the two periods together would amount to the prescriptive time requisite to give a prescriptive right of way.” *Id.* At best, *Lund* would have required UDOT to recognize a public right of way either before the road moved or after the road moved because public use during both periods could not be combined. But that is irrelevant in this case, where Union Pacific stipulated that a public right of way existed as of 1942. Thus, unlike *Lund*, which involved the establishment of a right of way, the issue here is whether the relocation of the road – again, assuming there was a relocation – somehow extinguished the right of way. Union Pacific cites no authority for the proposition that the right of way in this case ceased simply because it was adjusted for safety purposes.

The fact that the cases Union Pacific relies upon support the Commission’s decision is sufficient to demonstrate that the Commission did not exceed the bounds of reason and rationality. But as demonstrated below, Union Pacific’s arguments fail for a number of additional reasons.

**A. The Stipulation That a Public Right of Way Existed in 1942
Coupled with No Formal Abandonment of That Right of Way Is
Sufficient to Affirm the Commission's Order**

The Commission acted reasonably in affirming UDOT's determination that the crossing is public. The starting point for that inquiry is the point on which the parties agreed and stipulated — the road and crossing were public in 1942 when the County vacated certain nearby lands.⁷ (R. 948.) And as Union Pacific argued in its post-hearing brief, "[t]he former public right of way was not deeded or dedicated. Therefore, it was acquired, if at all, by implied dedication through use." (R. 826.) That implied dedication is important for two reasons.

First, if the right of way arose through implied dedication, its boundaries were established by the location of the road, instead of a legal description in a deed or express dedication. That means if the road has not moved, the road necessarily lies within the public right of way. Second, an implied dedication includes not only the precise contours of the original road — the "beaten path" — but also the area beside the beaten path reasonably necessary to facilitate the public's right to use the road. *Blonquist v. Blonquist*, 516 P.2d 343, 344 (Utah 1973); *Jeremy v. Bertagnole*, 116 P.2d 420, 423 (Utah 1941). That means, even if the road has moved, it may still lie within the scope of the original right of way.

⁷ Were the issue here whether the road ever became public, instead of its public nature as of 1942 being stipulated, then the movement of the road, public access to the road, traffic flow on the road, and any steps Union Pacific took to exclude the public would be relevant. *Bamberger Elec. R.R. Co. v. Public Utilities Comm'n*, 59 Utah 351, 204 P. 314 (1922).

The Commission concluded that the road had remained public based upon two cases: *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997), and *Western Kane Cnty. Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987). *Simpson* demonstrates that Union Pacific's blocking access to the road after it became public in 1942 does not extinguish its public nature. 942 P.2d at 313. In that case, the fact that Heber City had erected a barrier across a public road in 1989 did not impact the court's analysis of whether the road became, and remained, public. *Id.* And *Jackson Cattle Company* held that equitable estoppel could not be used to prevent a government entity from asserting rights in a public road due "to a long period of disuse by the public." 744 P.2d at 1377.

The combination of *Simpson* and *Jackson Cattle Company* indicate that, once a road becomes public, then neither a land owner's conduct nor public use bears on the road's future status. Rather, to become private again a public road must be formally vacated, just as the Commission found. Utah's statutory scheme for vacation of public roadways confirms that result: while roads can be impliedly dedicated to public use, they cannot be impliedly abandoned back to private ownership. Vacation of a roadway requires a formal act of the relevant government entity.⁸ Utah Code Ann. §§ 72-3-108; 72-5-105.

⁸ In contrast, were the road at issue here governed by a statute expressly stating that "[a] road not worked or used for a period of five years ceases to be a highway," then the public's use of the road after the 1970s might be relevant. *Sowadzki v. Salt Lake Cnty.*, 104 P. 111, 114 (Utah 1909) (quoting Section 2070, 1 Comp. Laws Utah 1888). Absent such a statute, abandonment is not at issue here, especially since the municipality – Vineyard – continues to consider the road public. *White v. Salt Lake City*, 239 P.2d 210, 213 (Utah 1952).

Ultimately, Union Pacific failed to carry its burden before the Commission of demonstrating the unreasonableness of UDOT's determination. And it now fails to show the unreasonableness of the Commission's decision upholding that classification. At the close of proceedings below, the Commission lacked evidence to conclude that the road moved at all, that it moved wholly beyond the scope of the original right of way, but was able to conclude that the original right of way was never formally vacated. In light of those shortcomings in Union Pacific's case below, the Commission's decision to affirm UDOT's classifying the crossing as public did not exceed the bounds of reasonableness.

B. Relocation by Union Pacific Is Irrelevant

Union Pacific's relocation of the road is irrelevant. Union Pacific argues that, where a road follows a right of way, by significantly relocating the road one does not thereby relocate the right of way. (AOB at 9-10.) Not only does that principle find no support in the cases cited by Union Pacific in the opening brief, but the principle would have no application here.

First, as shown above, the Commission did not find that the road was relocated because Union Pacific provided insufficient evidence of whether the road had moved at all or, if it did move, whether it merely shifted over time or was deliberately relocated. Neither an unmoved road nor a road that shifts naturally extinguishes a right of way. 39A C.J.S. *Highways* § 133 ("A deviation from its legal limits, unless of such nature as to evidence an intention to abandon

the part deviated from, will not work an abandonment of a highway legally established.”)

Second, assuming a deliberate relocation, the Commission did *not* find that someone other than Union Pacific relocated the road. As discussed, absent sufficient evidence from Union Pacific, the party challenging UDOT’s determination below, the failure to persuasively demonstrate to the Commission that the road was deliberately relocated is fatal to Union Pacific’s contentions on appeal. And even assuming Union Pacific is correct that a party possessing a right of way may not unilaterally relocate the right of way by moving the road, it follows that a land owner may not extinguish another’s right of way by unilaterally moving a road (or by acquiescing to the moving of the road). Briones v. Solomon, 769 S.W.2d 312, 318 (Tex. App. 1989) (where “the appellants themselves relocated the old existing implied road easement,” they were estopped from contesting the rights of the easement-holder to use the newly established course).

The cases cited in the opening brief do not support the proposition that a private decision to relocate a public road would extinguish the accompanying right of way. In *Vestal v. Young*, 82 P. 383, 383 (Cal. 1905), the court concluded that a party with a private easement for the maintenance of a ditch over another party’s land may not unilaterally relocate the ditch. In *Wasatch County v. Okelberry*, 2008 UT 10, ¶ 19, 179 P.3d 768, and in *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100-01 (Utah 1995), the court reversed grants of summary

judgment establishing public highways where there were disputed factual issues with respect to whether a non-permissive use had been continually made for the prescriptive period. In both cases, the question was whether a private road had become a public road. In *Thurman v. Byram*, 626 P.2d 447, 449-50 (Utah 1981), the court upheld the lower court's determination that a road was public and held that a party may not obtain a private easement over a public road. Again, the question was not whether a public road had again become private or what might happen to a right-of-way when a road moves. In *Petersen v. Combe*, 438 P.2d 545, 546-47 (Utah 1968), the court reversed an order declaring a road public where there was no evidence it had been public and the elements of implied dedication were not satisfied. And in *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 39, 208 P.3d 1077, the court of appeals upheld a grant of summary judgment in favor of establishing a public highway.

Union Pacific did not establish the legal proposition that a movement in the road would result in an extinguishment of the right of way. As is discussed next, that failure is not the only reason to affirm the Commission's decision. There, Union Pacific also failed to establish the scope of the right-of-way before the Commission because it did not raise the issue below. And Union Pacific failed to establish as a factual matter that the road moved from the right-of-way. Whether a moving road might change the nature of the underlying right-of-way is only one component of the argument Union Pacific must—but has failed to—make.

C. The Scope of the Original Right of Way Encompassed the Current Location of the Road

The current road also falls within the original public right of way because the scope of a right of way is as broad as necessary to ensure safety. Under Utah Code section 72-5-104(8), the scope of a right of way “is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.” *Blonquist*, 516 P.2d at 343 (“The width [is] not limited to the beaten path, but that which [is] reasonably safe and convenient for the use to which the road [is] put.”); *Bertagnole*, 116 P.2d at 423 (“The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement and travel [T]he easement cannot be limited, when acquired by use, to the actual beaten path.”).

The evidence before the Commission demonstrates that, if the road was relocated at all, it was relocated to make the crossing safe in light of a fatal accident at the crossing in the early 1970s. (R. 951; 1001:133.) If the road required reconfiguration “to ensure safe travel,” then under section 72-5-104(8) the road was not relocated beyond the scope of the right of way.

Moreover, the entire discussion of whether the road moved is beside the point. The determination of whether a crossing is public requires only that a road leading to and across the railroad tracks be public; it does not require that the public right of way accompanying that road be or remain a certain scope or width. While there is evidence that the road may have moved, for the public nature of the road to be extinguished, the road must have moved entirely off the

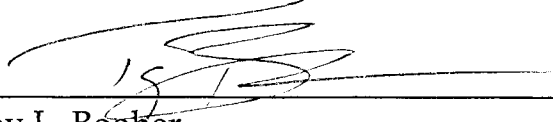
original right of way. There is no such finding here. Therefore, Union Pacific's arguments at best would demonstrate only that parts of the road are not on a public right of way. But Union Pacific never explains why that would be sufficient to render unreasonable the Commission's decision affirming UDOT's classification of the crossing as public. This court should affirm.

Conclusion

The Commission's decision affirming UDOT's exercise of discretion in declaring the crossing public does not exceed the bounds of reason and rationality. Union Pacific's argument on appeal, which is not preserved, fails for a number of reasons. UDOT has, and should have, authority to determine whether a crossing is public or private, and if public, to ensure the safety of a crossing through which UTA's Frontrunner trains will pass. This court should affirm.

DATED this 14th day of March, 2012.

ZIMMERMAN JONES BOOHER LLC



Troy L. Booher
*Attorneys for Respondent Anderson Geneva
Development, Inc.*

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because the brief contains 9,481 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 14th day of March, 2012.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Certificate of Service

This is to certify that on the 14th day of March, 2012, two true and correct copies of the foregoing were sent via U.S. Mail, postage prepaid, to:

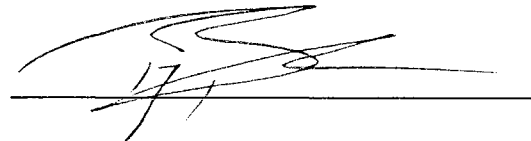
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Tab A

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Union Pacific Railroad's)
Petition for Relief against the Utah)
Department of Transportation (UDOT))

DOCKET NO. 09-888-01

REPORT AND ORDER

ISSUED: February 7, 2011

SYNOPSIS

Pursuant to Utah Code Ann. 54-4-15(4), the Commission finds that there is substantial evidence for UDOT's determination that the Crossing is a public crossing. The Commission further finds that UDOT failed to follow its own Rule in closing the Crossing, and such action was arbitrary and capricious. The Crossing shall be reopened and UDOT shall follow its Rules in determining whether the Crossing should be closed.

BACKGROUND

The Crossing

This dispute concerns a railroad crossing where 400 North in Vineyard (a.k.a. Vineyard Road) crosses the Union Pacific Railroad Company (UPRR)¹ right of way (ROW) (Crossing). The Crossing lies partly on, and adjacent to, property formerly owned by the Geneva Steel manufacturing plant, in what is now the Town of Vineyard, Utah County, Utah. Anderson Geneva, LLC, Ice Castle Retirement Fund, LLC, and Anderson Geneva Development, Inc. (Anderson Entities) now own and manage that property. Vineyard owns and maintains Vineyard Road. UPRR owns the ROW.

The UPRR ROW runs generally in a north-south direction,² about perpendicular to the 400 North road that runs generally from east to west³, from Utah Lake, across Geneva

¹ There is no dispute that UPRR's predecessor, the Denver and Rio Grande Western Railroad (D&RGW), acquired the ROW by deed dated 1881 from a private property owner.

² Tr. Vol.I, p.14.

Road and to what is now State Street in Orem, Utah. *See generally Union Pacific Railroad (UPRR) and Utah Department of Transportation (UDOT) Joint Trial Exhibits 132-134.* Part of Vineyard Road currently runs generally from south to north along the western boundary of the UPRR ROW and then veers west, following the section line towards Utah Lake. *See e.g. Tr. Vol.2, p.38, Anderson Entities Exhibits. 22, p.2 ("East Lake and Geneva Industrial Business Park"), UPRR/UDOT Joint Exhibits 133-135.*

The 1942 Resolution

There is no dispute that UPRR's predecessor, the Denver and Rio Grande Western Railroad (D&RGW), acquired the ROW by deed dated 1881 from a private property owner. There is no deed making the Crossing a public road or crossing, and although it is unclear how 400 North first became an authorized public crossing of the UPRR ROW, *Tr. Vol.2, p.20*,⁴ there is no dispute that prior to August 3, 1942, the Crossing was conclusively a public road and a public crossing⁵—in addition to the portion of 400 North that ran east from the Crossing towards what is now the Orem State Street. On that date, the County Commissioners of Utah County (Utah County) passed a Resolution and Order (1942 Resolution) vacating portions of 400 North lying within the boundaries of the steel plant. Utah County gave title to property lying on the north and east sides of the Crossing to the Defense Plant Corporation (a quasi-public corporation owned by the United States of America), for the purposes of constructing a steel

³ Id.

⁴ In any event, Mr. Barney stated recognized that the lack of a deed would likely have little bearing here, that such a fact would not be uncommon, and that public roads may come into being in various ways, including by public use. *Tr. Vol.2, p.242, ll.6-25, p.243, ll.1-15.*

⁵ The parties stipulated to this fact. *See Tr. Vol.1, p.14, ll.7-12.* (UPRR Counsel Mr. Pickett to Anderson Geneva Counsel Mr. Astill: Q: "I will ask counsel to correct me if I get this wrong, but I believe that the parties have stipulated that prior to the 1942 action by the county commissioners that we agree that this was a public road and a public crossing." A: "Yes.")

plant—what later became known as Geneva Steel. Although the public roads within the boundaries of the steel plant were vacated, the actual Crossing and 400 North from the eastern boundary of the ROW and running west, was not vacated as the following witnesses testified:

- Kent Barney, a licensed surveyor employed by Northern Engineering⁶ testified that based on the “val” map⁷, *see UPRR/UDOT Joint Exhibit 132,134*, the county road would not have been vacated by the 1942 Resolution. *Tr. Vol. 2, pp.240-241*;
- Jim Marshall, manager of special projects for UPRR⁸, testified that Utah County “vacated everything on the east side of the [Union Pacific] right of way” *Tr. Vol.1, p.15, ll.1-15*;
- Jerry Grover, current site engineer for the Anderson Entities,⁹ testified that the 1942 Resolution did not vacate the public crossing. *Tr.Vol.2, p.338, ll.14-23*;
- William Clark¹⁰ testified he plotted the 1942 Resolution, *see UPRR/UDOT Joint Exhibits 134, and Tr. Vol.2. p.15, ll.8-23*. He testified that the east boundary of the UPRR ROW was the edge of the 1942 Resolution vacation line, *Tr.Vol.2, p.70, ll.8-13*, anything north of the section line¹¹ was vacated, *Id. at ll.14-17, and UPRR/UDOT Exhibit 134*, and that anything south [of the section line] within the Railroad corridor and continuing to the west was not vacated. *Id. at ll. 18-21, p.71, ll.1-11*¹²;

⁶ Tr. Vol.2, p.229, 23-25.

⁷ “A val map is a map that was created to show what the Railroad owns . . . and [] this map and dimensions were created to, to know what the Railroad owned. How much acreage they owned. [“Val”] stands for . . . evaluation.” *Tr. Vol.2, p.27, ll.18-25, p.28, ll.1-6. See UPRR/UDOT Joint Exhibit 132, Tr.Vol.2, p.28, ll.1-12.*

⁸ Tr. Vol.1, pp. 11-12.

⁹ Mr. Grover is a licensed professional civil and structural engineer, formerly employed by Geneva Steel, and former Utah County Commissioner (with responsibility for road construction and railroad crossing in the County). *Tr. Vol.II, p.336-337.*

¹⁰ Mr. Clark is a licensed land surveyor with Psomas Engineering. *Tr. Vol.2. p.5.*

¹¹ See Tr. Vol.2, p.11-12, where Mr. Clark explains a “section line”

¹² See also Tr. Vol.2, p.78, ll.20-25.

- Mr. Clark also testified that the 1942 Resolution vacated lands within the steel plant, “excepting lands that run northerly and in a southerly direction and located west of said meander line and which road begins at the SW corner and terminates at the NW corner of the property first above described;” *Tr. Vol.2, p.80-81*;
- Mr. Clark further testified regarding the specific location of the public road and crossing at the time of the 1942 Resolution. Mr. Clark, stated that the 1927 D&RGW val map filed with Utah County¹³ showed the center line of the public road was at least 34.6 feet south from the vacating line established by the 1942 Resolution. *Id.* Clark said that for Utah County to have vacated any part of the public road that existed, the north half of the road would have needed to be at least 30 feet wide (the whole road needing to be 60 feet wide). *Tr. Vol.2, p.87.* Clark then testified that the 1927 D&RGW val map centerline of the Crossing located on the railroad was “incontrovertible.” *Tr. Vol.2, pp. 55-56.* Clark further testified that the 1927 County road depiction on the val map shows the road as approximately 50 feet wide. *Tr. Vol.2, p.40*, which support the contention that the entire road was not vacated by the 1942 Resolution.

Even after the 1942 Resolution, the Crossing was still recognized as public. No later than July 16, 1943, the Crossing was still recognized as public by a public entity, i.e. the Public Service Commission. UPRR’s predecessor, D&RGW, applied to the Commission for permission to cross 400 North (what the application identified as a public highway) as it upgraded the railway. As the Commission noted in its findings, D&RGW itself recognized the 400 North road crossing the ROW was an authorized public crossing, i.e. “a public highway.”

¹³ See *Tr. Vol.2, pp.57-60*, UPRR/UDOT Joint Exhibits 135, and Anderson Entities Exhibit 22.

See *Tr. Vol. 2, p.364, ll.3-15, UPRR/UDOT Joint Trial Exhibits 75-76*. Additionally, the State Road Commission, in a July 20, 1943, memorandum recognized the crossing as a public highway. *Tr. Vol. 2, p.365, ll.15-25, p.366, p.367, ll. 1-10*. Later, UPRR itself petitioned the Commission for permission for a “line into Bunker feed on Geneva Road.” *Tr. Vol. 2, p.368, ll.8-9*. Although the construction did not specifically deal with the 400 North crossing, the blueprints attached to the UPRR Amended Application identified the crossing as a public highway. *Tr. Vol. 2, p.368-369; UPRR/UDOT Joint Exhibits 85*. Vineyard continues to accept the Crossing as public.

Current Location of the Crossing and Public Road

Despite the fact that the County never formally abandoned the Crossing, at least a portion of the Crossing and what is left of 400 North presently lie over the land vacated by the 1942 Resolution. *Tr. Vol.2, pp. 41-43, Tr. Vol.2, p.41, Tr.Vol.2, pp. 41-44, UPRR/UDOT Joint Exhibits 133-135*. However, there are two possible explanations for the current placement of the public road and Crossing. The first explanation is that a reconfiguration placed the public road and Crossing where they are now. Sometime in the early 1970s, the angle and location of the Crossing was reconfigured, *Tr. Vol.1, p.18, ll.7-13, p.35, p.131, p.132*. Once the public road and Crossing were reconfigured, there were some changes in the road:

- The original crossing angle was altered from something less than a 90 degree angle to “something closer to a 90-degree angle to the tracks”, *Tr. Vol.1, p.133, ll.20-23*;
- The road would come through the UPRR ROW but not completely reach the eastern boundary of the UPRR ROW¹⁴, *Tr. Vol.2, pp. 41-43; Tr.Vol.2, p.117, ll.19-22*;

¹⁴ The UPRR ROW and railroad corridor are essentially synonymous. *Tr. Vol 2, p.14*.

- The reconfiguration moved the road almost completely off the public ROW, *Tr. Vol.2, p.41*, and Crossing almost entirely off the ROW, *Tr. Vol.2, pp. 41-44, UPRR/UDOT Joint Exhibits 133-135*.

The County was involved in discussions about reconfiguring the Crossing, as reflected in the minutes of the County Commissioners. *See UPRR/UDOT Joint Exhibits 158*. The suggestion of moving the Crossing some 600 feet to the north never materialized, however. *See Tr. Vol.1, p.35-36, p.134, ll.21-25*. Although, Mr. Marshall testified there is evidence the UPRR, the County, and the steel plant were involved in talks concerning the reconfiguration, *Tr. Vol.1, p.23, ll.13-25*, he also admits he “cannot tell” if UDOT was involved, *Tr. Vol.1, p.135, ll.1-3*, nor whether the changes were made by the steel plant alone. *Tr. Vol.1, p.132*. Although Mr. Marshall initially testified that the County Commissioner minutes do not indicate that the Crossing was public, *Tr. Vol.1, p.23, ll.19-25*, he also admits that though the reconfiguration might make the Crossing safer, reconfiguration would not change “the usage” of the Crossing, i.e. would not change whether it is public or private. *See Tr. Vol.1, p.135, ll.8-20*. There is not substantial evidence to find the County formally abandoned its ROW with the configuration, even if it did participate in the reconfiguration. In fact, Mr. Marshall admitted that neither UPRR nor its predecessor, D&RGW, ever went through a process to close the public crossing or what remained of 400 North after the 1942 Resolution. *Tr. Vol.1, p.95, ll. 24-25, p.96, ll.1-4*.

A second possible explanation for the current location of the public road and Crossing is the actual shifting of the road and Crossing. Some witnesses recognized that it would not be uncommon for the road to have shifted over 80 years or so. For example, Mr. Barney

stated that it would not be uncommon for a road to shift over time. *Tr. Vol.2, p.241, ll. 24-25, p.242, ll.1-3.*

There is no conclusive evidence that the road-as it currently exists—is how it was at the time of the 1942 Resolution. *See Tr. Vol.2, p.115, ll.2-9, see also Tr. Vol.2, p.113, ll.17-25.* But despite the lack of evidence showing precisely where the road actually was at the time of the 1942 Resolution, witnesses agree the County did not abandon the Crossing or the road. *See Tr. Vol.2, p.81, ll.14-25, p.82, ll.1-14; Tr. Vol.2, p.339, ll.16-25, p.340, ll.1-16.*¹⁵ For example, Mr. Barney testified that he saw no evidence that the 1942 Resolution “would have vacated the public road that crossed over the Railroad right-of-way in this location” nor any evidence that the “public road crossing over into the north, north of the section line.” *Tr. Vol.2, p.240, ll.19-15, p.241, ll.1-8.* Witnesses Clark and Grover agreed that the County would need the 400 North road remaining on the west side of the vacation line (and lying along the UPRR ROW) in order to maintain access to the lake, *Tr. Vol.2, p.81, ll.14-25, p.82, ll.1-14; Tr. Vol.2, p.339, ll.16-25, p.340, ll.1-16,* and did not vacate the remaining portion of 400 North and the Crossing.

Procedural Background

In January 2009, the Utah Department of Transportation’s (UDOT) Chief Railroad Engineer, Eric Cheng determined the Crossing was a private crossing. *See Anderson Entities’ Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 14, ¶6.* The Anderson Entities and Vineyard complained to UDOT and UTA that the public notices issued regarding the Crossing were defective because they identified 4000 North in Vineyard, and not 400 North. *See id. at ¶¶1-2.* Nonetheless, UDOT continued to maintain the

¹⁵ See also background above, regarding the testimony of witnesses Barney, Marshall, Clark, and Grover, the 1942 Resolution and preservation of the Crossing.

Crossing was private. The Anderson Entities petitioned the Commission for relief¹⁶, while at the same time it and Vineyard attempted to present evidence to UDOT the Crossing was public. In a letter issued February 25, 2009, UDOT reversed its determination designating the Crossing as private and decided to conduct another surveillance review “based upon the Crossing being public because of the [Federal Railroad Administration (FRA)] inventory listing¹⁷ this crossing as public and Resolution and Order passed by the Utah County Board of County Commissioners in 1942. At this point, UDOT considers this crossing as public” *See Anderson Entities’ Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 15.*

Additionally, UDOT had reviewed the 1942 Resolution and found that, based in part on the 1942 Resolution, the Crossing was public. *See Tr. Vol.2, ¶133, ll.1-22.*¹⁸ Because UDOT reversed its first determination finding the Crossing was private, the Anderson Entities asked the Commission to dismiss the petition for relief in Docket No. 09-999-05. Thereafter, however, UDOT did not conduct a surveillance review as it stated it would in its February 25, 2009 letter, *Tr. Vol.2, p.134, ll.5-10.* In a July 13, 2009 letter, UDOT also stated it would be closing the Crossing temporarily, stating the Crossing was unsafe. *See Anderson Entities’ Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 16.* It gave no basis for the temporary closure except to refer the parties to Utah Code Ann. §54-4-15. UDOT made a

¹⁶ This dispute initially commenced before the Commission in Docket No. 09-999-05, with the Anderson Entities bringing the petition for relief.

¹⁷ The FRA maintains a “data base . . . for the National Highway-Rail Crossing Inventory Data File” to “provide information to Federal, State and local governments as well as the railroad industry for the improvement of safety at highway-rail crossings.” *See UPRR/UDOT Joint Exhibits 17, ¶¶1.1, 1.2.* It is essentially an inventory of highway-rail crossings in the United States, with site-specific information pertaining to each crossing, including whether the crossing is private or public. *See id.*

¹⁸ Mr. Cheng stated: “[T]he city presented information of the [1942 Resolution]. And then we thought that this is a true document and it show it didn’t vacate the, the crossing . . . We accept . . . the Vineyard City’s presentations and we feel, okay, so we’ll rule it as a public.”

distinction between temporary and permanent closures, and stated that because the closing of the Crossing was only temporary, it did not need to follow Utah Admin. Code R.930-5-14. *See e.g. UDOT Post-hearing Brief*, ¶ 3. It again stated it would conduct a surveillance review. *See Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 16*. The Anderson Entities objected to the closure without the proper process per Utah Admin. Code R.930-5-7, -14. *See id., Exhibit 17*. On August 7, 2009, the Anderson Entities discovered that UDOT conducted a surveillance review not to reconsider the temporary closure, but to discuss the process for the closure. On August 12, 2009, UPRR filed its petition for relief against UDOT. UPRR asked the Commission to determine that UDOT improperly characterized the Crossing as public, that the Crossing be designated as private, and that the Crossing be ordered closed. *See UPRR Petition for Relief, p.3*.

This matter arose because of pending changes in the railroad crossings in connection with the Utah Transit Authority's Commuter Rail South project (FrontRunner). There is no dispute that as FrontRunner expands to Utah County, and runs through the Crossing and Vineyard Road, train traffic is expected to significantly increase, from 8-20 trains a day to 60-66 trains per day. *See e.g. UPRR Pre-hearing Position Statement, p.3., and Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Statement, p.10, ¶ 34*.

After a period of discovery and following continuances of the hearing date, the Administrative Law Judge (ALJ) of the Commission held a hearing on August 17-18, 2010. Reha Kamas and David M. Pickett represented UPRR. Renee Spooner, assistant attorney

general, represented UDOT. Dennis Astill represented the Anderson Entities. David Church represented Vineyard.

UDOT'S DESIGNATION OF THE CROSSING

Standard of Review

The Utah Administrative Procedures Act (UAPA) provides that “if a statute . . . permit[s] parties to any adjudicative proceeding¹⁹ to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after issuance of the order” *Utah Code Ann. § 63G-4-301(1)(a)*. Section 54-4-15(4) states “The commission retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department (UDOT) pursuant to this section.” *Utah Code Ann. § 54-4-15(2)*. UDOT took action to alter or abolish a crossing, and in doing so determined the legal rights or other legal interests of the parties. UPRR filed its petition for relief with the Commission within 30 days of UDOT’s July 13, 2009 letter finding the Crossing was public.

Although UCA 54-4-15(4) does not explicitly contain the standard of review the Commission should use when reviewing UDOT’s actions, Utah Code Ann. § 63G-4-102 gives the Commission guidance. Although that section refers to how an appellate court decides whether to grant relief to a person seeking judicial review, the UAPA also states it is “applicable to every agency of the state” and agency “action that determines the legal rights, duties . . . or other legal interests of an identifiable person²⁰” *Utah Code Ann. 63G-4-102(1)(a)*. As a

¹⁹ “‘Adjudicative proceeding’ means an agency action or proceeding described in Section 63G-4-102.” *Utah Code Ann. § 63G-4-103(1)(a)*.

²⁰ A person includes a group of individuals, partnership, corporation, association, political subdivision, etc. *UCA § 63G-4-103(1)(g)*.

“superior agency”²¹, the provisions of the UAPA are applicable here and the Commission uses its provisions to guide its review.

UDOT's Finding that the Crossing is Public

UDOT's determination that the Crossing was public is a factual determination.

Utah Code Ann. § 63G-4-303(4)(g) states:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . . the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

Therefore, the Commission must find that there is substantial evidence for UDOT's finding. *See First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990) (explaining that the “whole record” should be reviewed to determine whether the agency's action is “supported by substantial evidence”).

UDOT is given the authority to

determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety

Utah Code Ann. §54-4-15(2). With this explicit grant of authority over railroad crossings of public roads or highways, UDOT has an implied grant of authority necessary to carry out its duties, that is, to determine whether a crossing is public or private in the first place. *See Basin Flying Service v. Public Service Comm'n*, 531 P.2d 1303,1305 (Utah 1975) (holding that a

²¹ As defined in Utah Code Ann. § 63G-4-103(1)(j), a “superior agency” means “an agency required or authorized by law to review the orders of another agency.”

“regulatory body which is created and derives its powers and duties from statute has no inherent regulatory powers, but only those which are expressly granted, or which are clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it.”)

When determining whether a crossing is public or private UDOT is constrained in part by engineering standards. As to engineering standards, Mr. Cheng agreed that some of the engineering standards UDOT uses in making its determinations are: 1) the Highway-Rail Crossing Inventory Instructions and Procedures Manual (FRA Manual), *UPRR/UDOT Joint Exhibits 16-69, Tr.Vol.2,p.178,ll.24-25,p.179,ll.1-23*; 2) Private Highway-Rail Grade Crossing Safety Research and Inquiry report (Report), *UPRR/UDOT Joint Exhibits 70-71, Tr.Vol.2, p.179, ll.24-25, p.180, ll.1-8*; and 3) the Manual on Uniform Traffic Control Devices for Streets and Highway (MUTCD), *Tr.Vol.2, p.180, ll.9-12, See also Utah Code Ann. §41-6a-301*. Mr. Cheng recognized that the “MUTCD and the FRA standards” were “engineering safety guidelines.” *Tr.Vol.2, p.183, ll.3-14*.

Per the Report, “a crossing shall be classified as public if, and only if, the roadway is deemed a public road in accordance with 23 CFR Part 460.2” The MUTCD

defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to the public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing.

UPRR/UDOT Joint Exhibits 71. The FRA Manual defines a “public crossing” as

The location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public

FRA Manual at 1-5. The CFR defines “maintenance” means “preservation of the entire highway, including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization.” 23 CFR §460.2(d). The FRA Manual also states:

In general, a roadway across a railroad track for which both approaches are maintained by a public authority and which is open to the public is considered a ‘public’ crossing. These are roadways that are part of the general system of public streets and highways. Some jurisdictions accept a crossing as “public” when only one approach is publicly maintained. If a public authority accepts a crossing as ‘public’, it is a public crossing. All others are considered ‘private.’

FRA Manual at 1-6. The FRA Manual further states:

A private crossing is one that is on a private roadway which may connect to part of the general system of public streets and highways but is not maintained by a public authority. Usually, it is a crossing where the property on both sides or at least one side of the railroad tracks is private property. It may also be on a roadway that is publicly owned but which is either restricted or not intended for use by the general public. Private crossings are generally intended for the exclusive use of the adjoining property owner and the property owner’s family, employees, agents, patrons, and invitees. Crossings are classified as private where the normal need or use is for residential, farm, recreation/cultural, industrial or commercial activities.

FRA Manual at 1-7.

If viewing these engineering standards alone without considering the statutory and other legal provisions governing abandonment of public thoroughfares, it would seem the Crossing would be private. For example, the Crossing would not meet the MUTCD’s provision that either side of a crossing be a public roadway, given that only one side is public. Also, the FRA Manual reiterates that in order for the Crossing to be public, both approaches to the Crossing must be open to the public and also maintained by the County or some other public authority. When viewing these standards

and applying them to the Crossing and 400 North, it would tend to show the Crossing is private, as contended by UPRR.

However, despite Mr. Cheng opining that the Crossing was private, when considering solely engineering standards, *Tr. Vol. 2, p. 181, ll. 2-14*, he also recognized that focusing solely on engineering standards would lead to a different conclusion than if one looked at the legal issues surrounding the Crossing. *Tr. Vol. 2, p. 194, ll. 8-21*. He recognized that there was an apparent conflict between the two when he said “the Railroad’s evidence and the City’s evidence are just conflicting. That’s why we are all here arguing this So we just don’t know. It just appears to be conflicting.” *Tr. Vol. 2, p. 193, ll. 24-25, p. 194, ll. 1-4*. But Mr. Cheng agreed that UDOT is constrained not only by engineering standards, but also by state law governing the Crossing. *Tr. Vol. 2, p. 193, ll. 6-17, p. 194, ll. 13-21*.²²

When viewing the law governing the abandonment of public crossings, and even the language of the applicable engineering standards, there is substantial evidence showing the Crossing is public. This is true despite any reconfiguration, lack of maintenance or public use, or even the placement of barricades across the Crossing. Vineyard and the Anderson Entities both cited to statutes and case law that plainly support the principle that: “all public highways, streets, or roads once established shall continue to be highways, streets ROW roads, until abandoned or vacated *by order of a highway authority having jurisdiction or by other competent authority.*” *Utah Code. Ann. § 72-5-105(1)* (emphasis added). As further cited by the Anderson Entities, a

²² The Commission recognizes Mr. Cheng, at the hearing, said UDOT determined the Crossing was public as a “compromise” between the parties’ various interests, *Tr. Vol. 2, pp. 141-143, 161*, seeming to suggest that no standards were used. This assertion, however, contradicts the February 25, 2009 letter which UDOT issued wherein it explicitly stated its finding was based in part on the 1942 Resolution. Mr. Cheng, at the hearing, further reiterated that UDOT relied on the 1942 Resolution in making its determination, and not just a mere desire to compromise without regard to any evidence or standards.

“public highway can only be abandoned by an order of the county commissioners or other competent authority” *Clark v. Ereksen*, 341 P.2d 424, 426 (Utah 1959) (citing to UCA § 27-1-3 (1953), predecessor for UCA § 72-5-105 (2011)). “Section 72-5-105 plainly provides that a public highway remains a highway until the proper authorities order it ‘abandoned or vacated.’” *Culbertson v. Board of County Comm'rs*, 2001 UT 108. However the Crossing came to be a public crossing, the parties stipulated that by the time of the 1942 Resolution granting certain lands and roads to the steel plant, the Crossing was undoubtedly public, and likely had been since at least 1927. There is no dispute that since the 1942 Resolution, there has been no other formal vacation by any competent highway authority or by the County, or any other competent authority. There is also no evidence disputing that neither UPRR nor its predecessor, D&RGW, ever went through a process to close the public crossing or what remained of 400 North after the 1942 Resolution. Further, witnesses Barney, Marshall, Clark, and Grover all agreed that the east side of the UPRR ROW was the edge of the vacation line, that the portion of the Crossing lying within the UPRR ROW was not vacated, and that the portion of 400 North lying on the west side of the UPRR ROW was not vacated. There is substantial evidence that the Crossing continues to be a public crossing.

The Crossing is public despite the reconfiguration. In *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997), fn. 12, the Supreme Court reversed a district court’s decision declaring that a public highway was not public. The high Court stated: “The fact that the road has not been used since 1989 does not change its status as a public highway. In *Western Kane County Special Service District No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377-78 (Utah 1987), we held that a highway which had been dedicated and abandoned to the public by the

public's use of it 'from 1919 until 1931, when the highway *was relocated* and public use of the . . . road stopped,' still maintained its status as a public highway though half a century had passed since the road was used by the public (emphasis added)." There is no dispute the Crossing and a portion of the 400 North were reconfigured sometime in the 1970s. There is insufficient evidence to determine whether the County was involved in the reconfiguration or whether it was solely reconfigured by the steel plant and the UPRR. The evidence is also not clear as to the width of the 400 North road remaining after the 1942 Resolution. There is no doubt the road and Crossing, *as they presently lie*, are either entirely or partly within the land that was vacated. They lie almost completely off the public ROW. This relocation could have been a result of the reconfiguration or the road simply shifting over time. But even if the County had participated in the reconfiguration, its participation in the reconfiguration did not lead to abandonment or vacation without any formal order vacating the Crossing or the remainder of the road. Even if the road shifted over time, and then shifted a portion of the road and Crossing over the section line and within the area that was vacated, that change did not come as a result of a formal order of the County or other competent authority. Therefore, despite the fact the Crossing and portion of 400 North lie were reconfigured or shifted on the land previously abandoned, they were not abandoned or vacated originally by the 1942 Resolution, and were not abandoned or vacated by formal order thereafter. Therefore, its current placement has no effect on the legal nature of the Crossing today. UPRR's contention that the Crossing's "relocation away from the former public ROW" interrupted public use, *UPRR Post-hearing Position Statement*, p.9, is not correct. Its citation to language in *Wasatch County v Okelberry*, that "an overt act that is intended by a property owner to interrupt the use of a road . . . restarts' the running of the required ten-year

period under the Dedication Statute,” *Id.* at ¶ 6, applies to how a private owner interrupts a public thoroughfare from becoming such through dedication. It is not an exception to Section 72-5-105 nor does it allow vacation or abandonment by any means other than formal vacation by a competent authority. Section 72-5-105 “make(s) no allowance for any other type of abandonment or vacation” except by order. *Fries v. Martin*, 2006 UT App 514, ¶8. Our high Court has reiterated “the language of [section 72-5-105] to require *strict compliance* with statutory procedures to effect an abandonment or vacation of a public road by the government.” *Wasatch County v. Okelberry*, 2006 UT App 473, ¶26 (emphasis added).

Even assuming as true UPRR’s evidence that there has been a lack of public use or maintenance by any authority, this would still not change the Crossing’s public nature. “[U]nder Utah law, [a public highway] could not cease to be held for public use *by mere abandonment or nonuse* because real property designated as public use can only cease to be such by formal vacation. . . .” *Fries*, 2006 UT App 514 at ¶8. Therefore, property dedicated for public use is considered to be held for public use even if the county does not use it for that purpose, and the formal vacation rule applies. Even if there was no maintenance, that would not vacate or abandon the Crossing and remainder of 400 North. In *Henderson v. Osguthorpe*, 657 P.2d 1268, 1270, even where public property was “never . . . developed as a road and remain[ed] *essentially in its natural state, covered by trees and shrubs*” (emphasis added), the Court still held that the property designated for public use was subject to the formal vacation rule and was not vacated absent formal order. The County could not have abandoned or vacated the Crossing or the remainder of 400 North simply by nonuse or by lack of maintenance, even assuming those facts are true. The Crossing remained dedicated for public use, even though it was not being used

as such, and remains public until a competent authority abandons or vacates those public thoroughfares by formal order.

The placement of jersey barricades, the gate and other barriers across the Crossing did not change its public nature. By placing those barriers over the Crossing, no party gained some kind of “adverse possession” of the Crossing and 400 North, nor “interrupted” its public nature. In *Clark v. Ereksen*, 341 P.2d 424, (Utah 1959), the Court found that a private landowner, who had placed encroachments, which included buildings, fences, and trees, over a public thoroughfare for about thirty years, still acquired no rights over the public thoroughfare. It explicitly stated that a “public highway can only be abandoned by an order of the county commissioners or other competent authority” *Id.* at 425-26. In fact, in *Memmott v. Anderson*, 642 P.2d 750 (Utah 1982), the Court there even noted that the City's placement of a barricade across the road does not change the public status of the road absent a formal vacation or abandonment. The placement of barricades, fencing, or gates did not change the nature of the public thoroughfares in this matter.

Finally, even if there is no evidence that the Crossing and ROW was deeded, but only made public through dedication, this does not change the nature of the Crossing. “The formal vacation rule applies regardless of whether property was actually used by the public or simply designated for public use in a particular dedication.” *Fries*, 2006 UT App at ¶ 9. The Crossing is public and so are all public thoroughfares remaining after the 1942 Resolution.

Though these pronouncements of statutory and case law might seem to conflict with engineering standards, as Mr. Cheng opined, they do not. The MUTCD and FRA Manual allow for such occurrences as this Crossing at issue. For example, the MUTCD states that if one

approach to a crossing is not a public roadway, it is “typically”—not always, classified as a private crossing. Additionally, the FRA Manual also allows for instances where both approaches to a crossing are not publicly maintained, by saying that “in general” these crossings are private—but again, not always. The FRA Manual also explicitly states that if a public authority accepts a crossing as public it is public. Here, the Commission accepted and found the Crossing was public in two separate proceedings involving the D&RGW and the UPRR as noted previously. The State Road Commission considered the Crossing as public in 1943. Finally, Vineyard considers the Crossing a public crossing.²³ This result seemingly leaves the Crossing and what is left of 400 North as a bit of an oddity—a public thoroughfare that crosses into private property. Mr. Cheng admitted, however, that he was aware of at least one other crossing in Salt Lake County that extends into private property. *Tr. Vol. 2, p. 193*. The engineering standards do recognize exceptions to even general guidelines.

The Commission notes the FRA database inventory also listed the Crossing as a public at-grade crossing from about 1970 until 2009. *Anderson Entities Exhibit 7*. However, more than one witness testified about the mistakes made in private/public categorization, the piecemeal process for entering information in the database, allegations regarding lack of oversight for the input of information, and inaccuracies regularly contained in the database. *See e.g. Tr. Vol. 1, p. 73-75, Tr. Vol. 2, p. 136, ll. 6-25, p. 137, p. 138, p. 164.*²⁴ In any case, Mr. Cheng admitted that the FRA database inventory was not to be consulted for a determination of legal rights. *Tr. Vol. 2, p. 171, ll. 8-11*. Therefore, without more certainty regarding the information

²³ Vineyard adopted a Master Road Plan in 2008 shows the Crossing as part of Vineyard’s roadway plan. *See Anderson Entities’ Exhibit 19*.

²⁴ In fact, Mr. Marshall said the FRA database inventory was only 50% accurate, while Mr. Cheng opined it was 5-10% inaccurate. *See Tr. Vol. 2, p. 136*.

listing the Crossing as public in the database, the fact that the database listed the Crossing as public would not alone present sufficiently reliable evidence of its character.

The Commission finds there is substantial evidence the Crossing is public, together with remaining portions of 400 North.

UDOT'S CLOSING OF THE CROSSING

Standard of Review

Utah Code Ann. § 63G-4-303(4)(h)(ii) states that the Commission may grant relief to the Anderson Entities and Vineyard if the Commission determines that UDOT's actions in closing the Crossing were "contrary to a rule of the agency." UDOT admits it did not follow its own rule in closing the crossing and in not providing a surveillance review. It claims it did not do so because the closing of the crossing was only temporary, and not permanent. It claims its interpretation of its Rule should be given deference and that the Closing remain closed. It argues that "requiring public notice for temporary closures would negatively impact UDOT's ability to perform maintenance or emergency work, and that any such "could not be performed until the notice was given" *UDOT's Supplemental Post-hearing Brief*, p.4.

When UDOT is interpreting its own rule, the Commission grants UDOT's interpretation an intermediate standard of deference, *Semeco Industries, Inc. v. Utah State Tax Comm'n*, 849 P.2d 1167 (Utah 1993) (Durham, J., dissenting) (explaining the standards of review of agency actions under the UAPA scheme); *see Cf. Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶¶ 8,32 and *Westside Dixon Assocs., LLC v Utah Power and Light Co.*, 2002 UT 31, ¶ 7, and accept UDOT's interpretation of its Rule so

long as the interpretation is “reasonable and rational.” *R.O.A. General, Inc. v. UDOT*, 966 P.2d 840, 842 (Utah 1998). Administrative rules are interpreted like statutes, with the Commission focusing first on the plain language of the Rule. *Sierra Club v. Air Quality Board*, 2009 UT 76. UDOT cannot simply ignore the specific language of its Rule. *R.O.A. General, Inc.*, 966 P.2d at 842 (holding that “administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action.”). If it declines to follow its Rule, it must demonstrate a reasonable and rational basis for the departure from its Rule. See *Union Pacific R.R. v. Auditing Div.*, 842 P.2d 876, 879 (Utah 1992).

The Closure of the Crossing

UDOT’s enabling statutes authorize it to “close or restrict travel on a highway²⁵ under their jurisdiction due to construction, maintenance work, or emergency.” *Utah Code Ann.* 72-6-114. Additionally, UDOT is given the authority to

determine and prescribe the manner, including the particular point of crossing, and the terms . . . operation, maintenance, use and protection . . . crossing of a public road . . . by a railroad or street railroad, . . . and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety

Utah Code Ann. §54-4-15(2).

UDOT, like other regulatory agencies, is given authority to prescribe rules by which its enabling statutes will be implemented. In this case, UDOT had Utah Admin. Code

²⁵ See *Utah Code Ann.* § 72-1-102(7)

R930-5-7, and -14 in place²⁶ to implement, in part, Utah Code Ann. § 72-6-114 and Utah Code Ann. §54-4-15. R930-5-7 states in part:

The Department shall have a program for the identification of highway/railway crossings for improvement. Crossings may be identified for improvement upon recommendation from the diagnostic/surveillance review team or by formal finding of the department. . . . The Department shall consider all recommendations made by the team members, and input received from the public at large before issuing final orders for the improvement of grade crossings. . . . the Team reviews railroad crossings when requested by local agencies or when railroad traffic is proposed to significantly increase.”

The Rule also lists who comprises the diagnostic/surveillance review team. *Utah Admin. Code R930-5-7(2)*.

Utah Admin. Code R930-5-14 deals with the closure of public crossings.

It states in part:

Public notification is required when the Department is considering proposal to close public streets at crossings . . . addition of tracks at crossings, or construction of new public at-grade crossings. The Department shall advertise a notice of its intended action in a newspaper of general circulation, and if available, a newspapers of local circulation in the area affected The notice shall identify the project, briefly describe the changes proposed, . . . and contain general information relating to the proposed action²⁷

The plain language of the Rule makes no explicit distinction between temporary and permanent closures.

The Commission finds that UDOT failed to follow its Rules, failed to provide a reasonable and rational basis for its departure from its Rule, and must follow the procedures for closing the Crossing. UDOT claims that if the Commission were to

²⁶ R930-5-14 was repealed after this dispute commenced.

²⁷ The Rule also states UDOT may waive the requirement for public notice. However, UDOT may only waive that requirement “provided all parties affected concur in writing with the action proposed.” Parties affected include railroads, state, county city, boards or commissions, and “private persons or directly affected.” [sic] There is no evidence of such a written agreement here.

not adopt UDOT's interpretation of its Rule, it would "negatively impact UDOT's ability" to close the Crossing for emergency purposes. This is incorrect. As pointed out by the Anderson Entities, UDOT has in place Rules governing emergency orders which would govern the emergency closing of this Crossing. That Rule, Utah Admin. Code R907-1-14, entitled "Emergency Orders", provides for specific factual bases for using such an order, limitations on scope, and provisions for the issuance of the order. If the proper prerequisites are met, that Rule allows UDOT to close the Crossing "without notice and hearing in accordance with applicable law." *Utah Admin. Code R907-1-14*. Therefore, UDOT's attempt to evade its Rule by establishing some exception to R907-1-14, is improper and does not serve as a reasonable and rational basis to ignore the requirements of R930-5-7, and -14.

UDOT further argues that if the Commission does not accept its interpretation, it would inhibit UDOT's ability to close the Crossing in cases of maintenance and construction. This is also incorrect. UDOT still has the ability to close Crossings or public thoroughfares if it finds the need, but must follow its own process for doing so. Rule R930-5-7 and -14—both drafted by UDOT, implement the method by which UDOT will close or improve crossings or other public thoroughfares. The plain language of the Rules make no distinction between temporary and permanent closure. The plain language of the Rule require certain actions by UDOT before closing the Crossing, temporarily or permanently. UDOT's own rules require it to take recommendations from the diagnostic/surveillance review team before issuing final orders for improvement, such as closing or removing a Crossing. It failed to implement this surveillance review team in this instance. It was required to take input from the public at large

before closing the Crossing. It failed to do so. This failure came because it failed to follow another Rule, requiring it to issue public notice of the Crossing. It incorrectly identified the 4000 North crossing in Vineyard for closing, which is a non-existent crossing, instead of properly identifying the 400 North crossing in Vineyard. Its Rules require the diagnostic/surveillance team to review railroad crossings when requested by local agencies. Here Vineyard requested such a review, but no such review was conducted. Additionally, despite the fact that train traffic is expected to significantly increase with the addition of the FrontRunner project, UDOT failed to have a diagnostic/surveillance review team review the Crossing, gather information and reports, establish requirements, initiate appropriate action, obtain data, and issue orders as required by applicable Rules. *See Utah Admin. Code R.930-5-7.* Accordingly, the Commission finds UDOT must re-open the Crossing and follow the applicable Rules before making a decision on whether to close it.

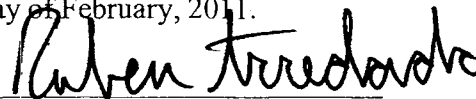
ORDER

The Commission orders as follows:

1. UDOT's characterization of the Crossing and remainder of 400 North as public is affirmed;
2. UDOT shall re-open the Crossing and follow applicable Rules in determining whether it should close the Crossing;
3. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the

filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 7th day of February, 2011.

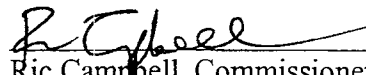


Ruben H. Arredondo
Administrative Law Judge

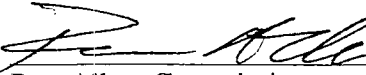
Approved and confirmed this 7th day of February, 2011, as the Report and Order of the Public Service Commission of Utah.



Ted Boyer, Chairman



Ric Campbell, Commissioner



Ron Allen, Commissioner

Attest:



Julie Orchard
Commission Secretary

G#70952

Tab B

Utah Code

Title 54 Public Utilities

Chapter 4 Authority of Commission Over Public Utilities

Section 15 Establishment and regulation of grade crossings.

54-4-15. Establishment and regulation of grade crossings.

(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the Department of Transportation having first been secured; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The department shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school buses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the department shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the department may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

(4) (a) The commission retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section, except as provided under Subsection (4)(b).

(b) If a petition is filed by a person or entity engaged in a subject activity, as defined in Section **19-3-318**, the commission's decision under Subsection (4)(a) regarding resolution of a dispute requires the concurrence of the governor and the Legislature in order to take effect.

Amended by Chapter 190, 1999 General Session

Utah Code

Title 72 Transportation Code

Chapter 3 Highway Jurisdiction and Classification Act

Section
108 County roads -- Vacation and narrowing.

72-3-108. County roads -- Vacation and narrowing.

(1) A county may, by ordinance, vacate, narrow, or change the name of a county road without petition or after petition by a property owner.

(2) A county may not vacate a county road unless notice of the hearing is:

(a) published:

(i) in a newspaper of general circulation in the county once a week for four consecutive weeks before the hearing; and

(ii) on the Utah Public Notice Website created in Section 63F-1-701, for four weeks before the hearing; and

(b) posted in three public places for four consecutive weeks prior to the hearing; and

(c) mailed to the department and all owners of property abutting the county road.

(3) The right-of-way and easements, if any, of a property owner and the franchise rights of any public utility may not be impaired by vacating or narrowing a county road.

(4) Except as provided in Section 72-5-305, if a county vacates a county road, the state's right-of-way interest in the county road is also vacated.

Amended by Chapter 90, 2010 General Session

Utah Code

Title 72 Transportation Code

Chapter 5 Rights-of-way Act

Section 104 Public use constituting dedication -- Scope.

72-5-104. Public use constituting dedication -- Scope.

(1) (a) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of 10 years.

(b) Dedication to the use of the public under Subsection (1) does not require an act of dedication or implied dedication by the property owner.

(2) The requirement of continuous use under Subsection (1) is satisfied if the use is as frequent as the public finds convenient or necessary and may be seasonal or follow some other pattern.

(3) Continuous use as a public thoroughfare under Subsection (1) is interrupted only when:

(a) the regularly established pattern and frequency of public use for the given road has actually been interrupted to a degree that reasonably puts the traveling public on notice; or

(b) for interruptions by use of a manned barricade on or after May 10, 2011:

(i) the person or entity interrupting the continuous use gives not less than 72 hours advance written notice of the interruption to the highway authority having jurisdiction of the highway, street, or road; and

(ii) the manned barricade is maintained for at least 24 consecutive hours.

(4) Installation of gates and posting of no trespassing signs are relevant forms of evidence but are not solely determinative of whether an interruption has occurred.

(5) If the highway authority having jurisdiction of the highway, street, or road demands that an interruption cease or that a barrier or barricade blocking public access be removed and the property owner accedes to the demand, the attempted interruption does not constitute an interruption under Subsection (3).

(6) (a) The burden of proving dedication under Subsection (1) is on the party asserting the dedication.

(b) The burden of proving interruption under Subsection (3) is on the party asserting the interruption.

(7) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.

(8) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

(9) (a) The provisions of this section apply to any claim under this section for which a court of competent jurisdiction has not issued a final unappealable judgment or order.

(b) The legislature finds that the application of this section:

(i) does not enlarge, eliminate, or destroy vested rights; and

(ii) clarifies legislative intent in light of Utah Supreme Court rulings in *Wasatch County v. Okelberry*, 179 P.3d 768 (Utah 2008), *Town of Leeds v. Prisbrey*, 179 P.3d 757 (Utah 2008), and *Utah County v. Butler*, 179 P.3d 775 (Utah 2008).

Amended by Chapter 341, 2011 General Session

Utah Code

Title 72 Transportation Code

Chapter 5 Rights-of-way Act

Section 105 Highways, streets, or roads once established continue until abandoned -- Temporary closure.

72-5-105. Highways, streets, or roads once established continue until abandoned -- Temporary closure.

(1) All public highways, streets, or roads once established shall continue to be highways, streets, or roads until formally abandoned or vacated by written order, resolution, or ordinance resolution of a highway authority having jurisdiction or by court decree, and the written order, resolution, ordinance, or court decree has been duly recorded in the office of the recorder of the county or counties where the highway, street, or road is located.

(2) (a) For purposes of assessment, upon the recordation of an order executed by the proper authority with the county recorder's office, title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with one-half of the width of the highway, street, or road assessed to each of the adjoining owners.

(b) Provided, however, that should a description of an owner of record extend into the vacated or abandoned highway, street, or road that portion of the vacated or abandoned highway, street, or road shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this Subsection (2).

(3) (a) In accordance with this section, a state or local highway authority may temporarily close a class B or D road, an R.S. 2477 right-of-way, or a portion of a class B or D road or R.S. 2477 right-of-way.

(b) (i) A temporary closure authorized under this section is not an abandonment.

(ii) The erection of a barrier or sign on a highway, street, or road once established is not an abandonment.

(iii) An interruption of the public's continuous use of a highway, street, or road once established is not an abandonment even if the interruption is allowed to continue unabated.

(c) A temporary closure under Subsection (3)(a) may be authorized only under the following circumstances:

(i) when a federal authority, or other person, provides an alternate route to an R.S. 2477 right-of-way or portion of an R.S. 2477 right-of-way that is:

(A) accepted by the highway authority; and

(B) formalized by:

(I) a federal permit; or

(II) a written agreement between the federal authority or other person and the highway authority; or

(ii) when a state or local highway authority determines that correction or mitigation of injury to private or public land resources is necessary on or near a class B or D road or portion of a class B or D road.

(d) A highway authority shall reopen an R.S. 2477 right-of-way or portion of an R.S. 2477 right-of-way temporarily closed under this section if the alternate route is closed for any reason.

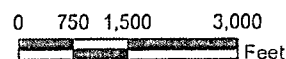
- (e) A temporary closure authorized under Subsection (3)(c)(ii) shall:
 - (i) be authorized annually; and
 - (ii) not exceed two years or the time it takes to complete the correction or mitigation, whichever is less.
- (4) Before authorizing a temporary closure under Subsection (3), a highway authority shall:
 - (a) hold a hearing on the proposed temporary closure;

 - (b) provide notice of the hearing by:
 - (i) mailing a notice to the Department of Transportation and all owners of property abutting the highway; and
 - (ii) (A) publishing the notice:
 - (I) in a newspaper of general circulation in the county at least once a week for four consecutive weeks before the hearing; and
 - (II) on the Utah Public Notice Website created in Section **63F-1-701**, for four weeks before the hearing; or
 - (B) posting the notice in three public places for at least four consecutive weeks prior to the hearing; and
 - (c) pass an ordinance authorizing the temporary closure.
- (5) The right-of-way and easements, if any, of a property owner and the franchise rights of any public utility may not be impaired by a temporary closure authorized under this section.

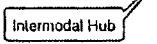
Amended by Chapter 341, 2011 General Session

Tab C












139



1 inch equals 1,500 feet



Legend

-  Grade-separated RR Crossing
-  Intersections with Arterials
-  Roundabouts
-  Boulevard
-  Parkway
-  Local
-  Future Boulevard
-  Future Parkway
-  Future Local
-  Existing Paved Roads
-  Railroad Tracks

THE TOWN OF
Vineyard

J·U·B

J-U-B ENGINEERS, Inc.
ENGINEERS • SURVEYORS • PLANNERS

TOWN OF VINEYARD

Major Streets Plan

Tab D

Addendum D1

G#67422

REVIEWED BY COMMISSIONERS

TED BOYER RB 7/6

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RON ALLEN RA 7/7

PUBLIC SERVICE COMMISSION

2010 JUN 30 P 4:42

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**UNION PACIFIC RAILROAD
COMPANY'S STATEMENT OF
UNDISPUTED AND DISPUTED FACTS**

Docket No. 09-888-01

In support of its petition, Union Pacific submits this Pre-hearing Statement of Undisputed and Disputed Facts related to the railroad grade crossing at 400 North in Vineyard, Utah, that is the subject of this dispute (the "Crossing"). Union Pacific reserves the right to supplement and/or amend this Statement before the hearing on this matter.

Undisputed Facts

The following relevant facts are not in dispute:

1. Union Pacific's predecessor, the Denver & Rio Grande Railroad, acquired the right of way in the area of the Crossing by deed dated 1881 from private property owner Stagg.
2. The right of way extended fifty feet on either side of the center line of the Union Pacific track.
3. When the railroad acquired the right of way from private property owner Stagg, no public road existed.

4. At some point between 1881 and 1942, 400 North came to cross Union Pacific's right of way at grade, and was apparently a public road.
5. On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North.
6. The Resolution and Order vacated and abandoned the north half of 400 North on the west side of the Crossing and going over the Crossing. And 400 North was vacated and abandoned in its entirety at the Defense Plant Corporation property line on the east side of the Crossing.
7. Shortly after the Resolution and Order was passed, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing.
8. A gate was installed there to provide access, and the gate served for the next approximately sixty years to control access to the steel mill site.
9. Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005.
10. The gate closing off what was once 400 North on the east side of the Crossing was closed when Anderson Geneva began work on the development and remained closed until it was re-opened during the pendency of this action.
11. The Crossing was reconfigured by operators of the steel mill in the 1980s.
12. Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day.

Disputed Facts

1. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, what had been 400 North was used on the east side of the Crossing as access for the employees and other business invitees of operators of the steel mill as access to a parking lot.
2. No public entity has conducted maintenance on the Crossing since 1942.
3. No requests have been made by anyone to enter the Union Pacific right of way to perform maintenance.
4. There were no pavement markings or advanced warning signs on the west side of 400 North at the time this dispute arose.
5. When the Crossing was reconfigured by operators of the steel mill in the 1980s, it was done without knowledge of or permission from Union Pacific or any municipality.
6. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

DATED this 30th day of June, 2010.



Reha Kamas
Attorneys for Union Pacific

Certificate of Service

I hereby certify that on the 30th day of June, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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Addendum D2

G #67426

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**UNION PACIFIC RAILROAD
COMPANY'S PRE-HEARING
POSITION STATEMENT**

Docket No. 09-888-01

This matter concerns a crossing at the location where 400 North crosses the Union Pacific and UTA right of way in Vineyard, Utah (the "Crossing"). The Utah Department of Transportation, reversing an earlier decision, has determined that the Crossing is a public crossing. Union Pacific challenges that conclusion and asks the Commission to find that the Crossing is a private crossing. In support of its petition, Union Pacific submits this Pre-hearing Position Statement. Union Pacific reserves the right to supplement and/or amend this Position Statement before the hearing on this matter.

Factual Background

In this area, Union Pacific's predecessor, the Denver & Rio Grande Railroad, acquired the right of way by deed dated 1881 from private property owner Stagg. The right of way extended fifty feet on either side of the center line of the Union Pacific track. Obviously, when the railroad acquired the right of way from private property owner Stagg, no public road existed.

At some point between 1881 and 1942, 400 North came to cross Union Pacific's right of way at grade, and was apparently a public road. To date, no documents have been located that reveal the legal arrangement by which this public road was an authorized crossing of Union Pacific's right of way. If such documents are located before the hearing of this matter, Union Pacific reserves the right to supplement its document production and amend this Position Statement.

On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North. The Resolution and Order stated: "It further appearing that certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living with thi vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished, and that Utah County quitclaim said plant site to the said Defense Plant Corporation." Specifically, the north half of 400 North was vacated and abandoned on the west side of the Crossing and going over the Crossing. And 400 North was vacated and abandoned in its entirety at the Defense Plant Corporation property line on the east side of the Crossing.

At this time, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing. A gate was installed there to provide access, and the gate served for the next approximately sixty years to control access to the steel mill site. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, what had been 400 North was used on the east side of the Crossing as access for the employees and other business invitees of operators of the steel mill as access to a parking lot.

Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005. The gate closing off what was once 400 North on the east side of the Crossing was closed when Anderson Geneva began work on the development and remained closed until it was re-opened during the pendency of this action.

No documents have been produced or located during discovery in this matter that show that any public entity has conducted maintenance on the Crossing since 1942. No documents show any request to enter the Union Pacific right of way to perform maintenance. There were no pavement markings or advanced warning signs on the west side of 400 North at the time this dispute arose.

However, the Crossing was reconfigured by operators of the steel mill in the 1980s. There is no evidence that any other entity or municipality was involved or gave their permission for this major work on the Crossing and the west approach to the Crossing.

Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

Standards

The Manual on Uniform Traffic Control Devices "defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing." Private Highway-

Rail Grade Crossing Safety Research and Inquiry at 3.

Similarly, the National Highway-Rail Crossing Inventory Instructions and Procedures Manual states that a “public crossing” is “the location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public.” Introduction and Procedures Manual § 1-5. “A crossing shall be classified as public if, and only if, the roadway is deemed a *public road* in accordance with 23 CFR Part 460.2.” *Id.*

Under the Code of Federal Regulations, a public street or highway is “any road under the jurisdiction of and maintained by a public authority and open to public travel.” 23 C.F.R. § 460.2(a). A street or highway is “open to public travel” when it is “available, except during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight or class of registrations.” *Id.* § 460.2(d).

In addition, in order to be a “public crossing” under the national Highway-Rail Crossing Inventory Instructions, the location where railroad tracks intersect a roadway must be “under the jurisdiction of and maintained by a public authority and open to the general traveling public.” Introduction and Procedures Manual § 1-5. Under the Code of Federal Regulations, “maintenance” means “preservation of the entire highway, including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization.” *Id.* § 460.2(d).

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Analysis

For two main reasons, the Crossing at issue here does not meet the definition of a public crossing, and is therefore private. First, under the definitions above, for the Crossing to be public, the roadway on either side must be a public roadway. This Crossing has not been open to public travel since the property on the east side of the Crossing was quitclaimed to Defense Plant Corp. on August 10, 1942. The Resolution and Order quitclaiming the property stated that “certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living within the vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished”

The 1942 Resolution and Order recognized that the general public no longer needed access to the Geneva Works site. At that time, a gate was placed and the road was no longer open to public travel. The east side of the Crossing enters the site and was used by steel mill owners as an entrance to the plant for employees and others. Since closure of the steel mill site, the Crossing has seen little traffic. In fact, the current landowners, Anderson Geneva, have placed a fence at or near the property line and have blocked off the road entering the property. The fence has been in place since some time in 2005. Therefore, the crossing has been closed to the public for approximately 67 years. It enters a “privately-owned roadway[] utilized only by the owner’s licensees and invitees.” Therefore, it is a private crossing under the definition set forth in the Railroad-Highway Grade Crossing Handbook at page 223.

The second requirement of the above definition is that the roadway on either side of the crossing must be under the jurisdiction of and maintained by a public authority. There is no

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evidence that the Crossing has been maintained by a public agency—on either side of the railroad tracks. In fact, the only significant alterations to the Crossing were made by steel mill operators in the 1980s without the participation of a public entity or of Union Pacific.

Public maintenance is required if the road traversing the Crossing is to be considered a public road. Since public maintenance has not been performed on the approaches to the Crossing, the road over the Crossing cannot be considered public. If the road over the Crossing is not public, the Crossing is not public.

Union Pacific acknowledges that the Crossing has been categorized as public in the FRA database. However, the FRA database is often incorrect. Moreover, the definition of a public crossing in the FRA database is consistent with Union Pacific's analysis and conclusion that the Crossing is private.

UTA will be operating commuter rail in this location shortly. The addition of commuter rail widens the Crossing, increases train volume, and places freight trains and commuter trains, operating at different speeds, in the Crossing, potentially at the same time. Public use of an at-grade crossing with these characteristics potentially subjects Union Pacific to increased claims. In addition, public safety demands that a careful and accurate determination be made whether the Crossing is public or private. The evidence, as measured against the applicable standards, indicates that the Crossing is private. Union Pacific urges the Commission to so rule.

Conclusion

For the reasons set forth above, Union Pacific respectfully requests that the Commission grant Union Pacific's petition and find that the Crossing is private.

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DATED this 30th day of June, 2010.



Reha Kamas
Attorneys for Union Pacific

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Certificate of Service

I hereby certify that on the 30th day of June, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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Addendum D3

G#67991

Administrative Law Judge RHA
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2009-03 P 5:37

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
 Petition for Relief against the Utah Department
 of Transportation

UNION PACIFIC RAILROAD
 COMPANY'S AMENDED AND
 SUPPLEMENTAL PRE-HEARING
 POSITION STATEMENT

Docket No. 09-888-01

At issue in this case is the status of an at-grade rail crossing at the location where 400 North crosses the Union Pacific and UTA right of way in Vineyard, Utah (the "Crossing"). The Utah Department of Transportation, reversing an earlier decision, has determined that the Crossing is a public crossing. Union Pacific challenges that conclusion and asks the Commission to find that the Crossing is a private crossing. In support of its petition, Union Pacific submits this Amended and Supplemental Pre-hearing Position Statement.

Factual Background

At the location of the Crossing, Union Pacific's predecessor, the Denver & Rio Grande Western Railroad, acquired the right of way by deed dated 1881 from private property owner Stagg. The right of way extends fifty feet on either side of the center line of the Union Pacific track.

At some point, 400 North came to cross Union Pacific's right of way at grade. To date, no documents have been located that reveal a legal arrangement by which this road became an authorized crossing of Union Pacific's right of way. Nor have any documents been found that reveal a dedication or other indication of the origin of the road.

On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North and giving title to property on the north and east sides of the Crossing to the Defense Plant Corporation, predecessor of Geneva Steel, for the construction of a steel mill. *See* Exhibit A. The Resolution and Order stated: "It further appearing that certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living with the vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished, and that Utah County quitclaim said plant site to the said Defense Plant Corporation." *Id.*

Specifically, 400 North was vacated and abandoned to the section line on the west side of the Crossing and going over the Crossing. In addition, 400 North was vacated and abandoned in its entirety on the east side of the Crossing at Union Pacific's east right of way boundary, which was also established as the Defense Plant Corporation's west property line. *See* Current Conditions Map, attached as Exhibit B.

At this time, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing. A gate was installed there and served for the next approximately sixty years to control access to the steel mill site. Beyond the gate was a

parking lot. At the entrance to the parking lot was a guard shack. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, 400 North beyond Vineyard Road (which runs parallel to the railroad tracks on the west side of the Crossing) was used solely as access for the employees and other business invitees of operators of the steel mill.

Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005. Anderson Geneva closed the gate on the east side of the Crossing when it began work on the development and the gate remained closed until it was re-opened during the pendency of this action.

No documents have been produced or located in discovery in this matter that show that any public entity has conducted maintenance on the Crossing or the approaches to it since 1942. No documents show any request to enter the Union Pacific right of way to perform maintenance. There were no pavement markings on the west side of 400 North at the time this dispute arose and, in fact, there had been no pavement markings since at least 1970. U.S. DOT Crossing Inventory Information, attached as Exhibit C.

However, the Crossing was reconfigured by operators of the steel mill in the 1970s or 1980s. There is no evidence that any other entity or municipality was involved or gave permission or funding for this relocation of the Crossing and the roadway approach to the Crossing on the west side.

Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

Standards

"A crossing shall be classified as public if, and only if, the roadway is deemed a *public road* in accordance with 23 CFR Part 460.2." Private Highway-Rail Grade Crossing Safety Research and Inquiry at 3. The Manual on Uniform Traffic Control Devices "defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing." *Id.*

Similarly, the National Highway-Rail Crossing Inventory Instructions and Procedures Manual states that a "public crossing" is "the location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public." The Instructions and Procedures Manual for the Federal Railroad Administration Highway-Rail Crossing Inventory Data Maintenance Program ("FRA Manual") at 1-5, attached as Exhibit D. Under the Code of Federal Regulations, "maintenance" means "preservation of the entire highway,

including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization.” 23 C.F.R. § 460.2(d).

Further, under the Code of Federal Regulations, a public street or highway is “any road under the jurisdiction of and maintained by a public authority and open to public travel.” 23 C.F.R. § 460.2(a). A street or highway is “open to public travel” when it is “available, except during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight or class of registrations.” *Id.* § 460.2(d).

“If the primary function of the road is to provide public access to a publicly owned facility for the principal purpose of on-site use by the public, then the facility may be deemed a logical terminus of a public roadway. . . . Thus, crossings which exist for the primary purpose of providing public access to publicly owned and operated facilities such as fairgrounds, parks, schools, libraries, hospitals, clinics, airports, bus terminals, beaches, piers, boat launching ramps, recreational facilities, etc., which permit access to or invite use by the general traveling public would satisfy the definition ‘open to public travel,’ even if the entrance thereto is equipped with gates to effect seasonal or periodic closures (such as overnight), or limit access, or require an entry fee for use.” FRA Manual 1-6.

Therefore, “[i]n general, a roadway across railroad track for which both approaches are maintained by a public authority and which is open to the public is considered a ‘public’

crossing. These are roadways that are part of the general system of public streets and highways. Some jurisdictions accept a crossing as 'public' when only one approach is publicly maintained. If a public authority accepts a crossing as 'public,' it is a public crossing. *All others are considered 'private.'*” FRA Manual at 1-6 (emphasis added).

A “private crossing is one that is on a private roadway which may connect to part of the general system of public streets and highways but is not maintained by a public authority. Usually, it is a crossing where the property on both sides *or at least one side* of the railroad tracks is private property. It may also be on a roadway that is publicly owned but which is either restricted or not intended for use by the general public. *Private crossings are generally intended for the exclusive use of the adjoining property owner and the property owner’s family, employees, agents, patrons and invitees.* Crossings are classified as private where the normal need or use is for residential, farm, recreation/cultural, industrial or commercial activities.” FRA Manual 1-7 (emphasis added).

Analysis

The Crossing at issue here does not meet the definition of a public crossing, and is therefore private.

A. Under applicable standards, the Crossing is private

1. The Crossing leads to private property and has not been used by the public at least since 1942

For the Crossing to be public, the roadway on either side must be a public roadway. The Crossing has not been open to public travel since the property on the east side was quitclaimed to

Defense Plant Corporation on August 10, 1942. The Resolution and Order quitclaiming the property stated that “certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living within the vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished” *See* Exhibit A.

The 1942 Resolution and Order recognized that the general public no longer needed access to the steel mill property. At that time, a gate was placed and the road was no longer open to public travel. The east side of the Crossing enters the mill property and was used by steel mill owners as an entrance to the mill for employees and others. Since closure of the steel mill, the Crossing has seen little traffic. In fact, the current landowners, Anderson Geneva, have placed a fence at or near the property line and have blocked off the road entering the property. The fence has been in place since some time in 2005. Therefore, the crossing has been closed to the public for approximately 67 years. It enters a “privately-owned roadway[] utilized only by the owner’s licensees and invitees.”

2. Even if a public right of way exists, it does not extend through the Crossing

Further, whether or not any part of 400 North was located north of the section line in 1942 when the steel mill property was vacated and abandoned, and even if 400 North is construed to have been a public right of way as it entered the railroad right of way in 1942, there is not a public right of way today that extends all the way through the Crossing. *See* Current Conditions Map, attached as Exhibit B. The Crossing was reconfigured in the 1970s or 1980s. Even if there was a public right of way extending over the Crossing before the reconfiguration,

the reconfiguration relocated the Crossing in such a way as to move it off the public right of way, either substantially or totally. Any public right of way that remains in the Crossing does not extend all the way over the Crossing from the west side to the east side.

3. No public entity has conducted maintenance

Lack of public maintenance also indicates that the Crossing is private. There is no evidence that the Crossing has been maintained by a public agency—on either side of the railroad tracks. There have been no pavement markings at the Crossing since at least 1970. In fact, the only significant alterations to the Crossing were made by steel mill operators in the 1980s, and there is no evidence of the participation of a public entity or of Union Pacific.

Public maintenance is required if the road traversing the Crossing is to be considered a public road. Since public maintenance has not been performed on the approaches to the Crossing, the road over the Crossing cannot be considered public. If the road over the Crossing is not public, the Crossing is not public.

For all of these reasons, the Crossing is a private crossing under the applicable standards.

B. The Crossing has never been determined to be public

The Crossing has never been determined to be public in any prior administrative proceeding. Anderson Geneva argues that a 1943 Public Service Commission decision determined that the Crossing was public and that this decision should be given estoppel effect. Anderson Geneva stretches this ruling too far. The nature of the Crossing was not at issue.

Instead, as Anderson Geneva admits, in the 1943 action, the railroad sought permission to construct a second main line track. A list of all roads to be crossed by the second main line was included in the Public Service Commission's Tentative Order. The Crossing at issue was described as:

A county highway crossing to Geneva Steel Plant at m.p. 708 plus 925 feet, on section line between Sec. 8 and 27, Twp. 6 South, R. 2 E., Utah County, at a point approximately 2700 feet west from the northeast corner of said Sec. 17.

Case No. 2710 at 2, attached as Exhibit D.

The decision assumes but does not decide that 400 North is a "county highway." The decision does not address the question whether the Crossing is public or private. Notably, however, the description of 400 North in the Tentative Order differs from the descriptions of the other roads. Other county roads are identified merely as a "county highway," followed by the mile post location. By contrast, 400 North is identified as a "county highway crossing to Geneva Steel Plant." Similarly, the Utah County Surveyor wrote a letter to the Board of County Commissioners on July 23, 1943, in which the Surveyor described 400 North at this location as "Highway crossing . . . Entrance into steel plant." July 23, 1943, Letter from Utah County Surveyor to Board of County Commissioners, Exhibit D.

Further, the 1942 Report of Investigation made in connection with the railroad's request to construct the second main line refers to the roads to be crossed by the new rail line as "designated as County Roads." July 20, 1943, Report and Investigation at 1, Exhibit D. This strongly suggests that the parties and the Commission were relying on designations found

elsewhere and supports the conclusion that the Commission assumed, but did not decide, that 400 North was a "county highway crossing to Geneva Steel Plant."

Collateral estoppel, or issue preclusion, is a judicially-created doctrine that "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." A party seeking to invoke collateral estoppel must show (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.

Gudmundson v. Del Ozone, 232 P.3d 1059, 1067 (Utah 2010).

Because, in the 1943 Public Service Commission action it was assumed, rather than decided, that 400 North was a county highway, and because the question of whether the Crossing was public or private was not litigated or decided, collateral estoppel does not apply. The issues presented here were not raised in that action. The questions whether 400 North was a public road and whether the Crossing was a public crossing were not raised, were not fully and fairly litigated, and were not decided. Accordingly, this decision cannot be given estoppel effect.

C. The FRA database does not serve as notice to developers of the status of a crossing

Union Pacific acknowledges that the Crossing has been categorized as public in the FRA database. However, the FRA database was never intended to be used or relied upon by a private developer such as Anderson Geneva. The National Highway-Rail Crossing Inventory Data File is maintained by the Federal Railroad Administration ("FRA") "for use by States and railroads."

FRA Manual at 1-1, attached as AE Exhibit 22 to the Anderson Entities' Statement of

Undisputed and Disputed Facts and Pre-hearing Position Brief (emphasis added). Further, there is no legal support for the argument that Union Pacific's contributions of information to a federal database can be construed as representations to every member of the public, and may be enforced under the doctrine of equitable estoppel.

The FRA database (formally named the National Highway-Rail Crossing Inventory Data File) arose out of a 1972 report of the United States Department of Transportation to Congress, which was aimed at providing recommendations "for alternative courses of action which would lead to a significant reduction in accidents, fatalities, personal injuries and property damage at highway-rail crossings. The report recommended the development of an adequate information system." *Id.*

The FRA "entered into a contract with the Association of American Railroads to develop a 'Comprehensive National Highway-Rail Crossing Information and Numbering System.' The project was established as a cooperative effort between all the nation's railroads and the U.S. Department of Transportation" *Id.* at 1-2 to 1-3.

Under the contract, the "railroad companies, with direction and guidance from the Association of American Railroads and the American Short Line Railroad Association, were assigned the responsibility for making a site-specific inventory of each highway-rail crossing and for installing a unique identifying number at each location. The railroads were also identified as being responsible for periodic update of certain inventory information and maintenance of the

crossing number.” *Id.* at 1-3. It is, therefore, inaccurate to state that Union Pacific has a statutory obligation with respect to the database.

Importantly, the FRA maintains two data files, the Inventory Data File and the Accident Data File. “Routinely, the highway-rail crossing accident data is integrated with inventory data and the information from the combination is used for the development of Federal programs, funding alternatives for crossing improvement, studies related to railroad safety programs, effectiveness of warning devices, high-speed railroad corridors, accident costs, public awareness and driver training, and other safety program development and research opportunities.” *Id.* at 1-3 (emphasis added). The information is *not* used to communicate to the public the whether railroad crossings such as the one at issue here are public or private.

Moreover, as UDOT is aware, the FRA database is often incorrect. Further, as set forth above, the definition of a public crossing in the FRA database is consistent with Union Pacific’s analysis and conclusion that the Crossing is private.

Conclusion

UTA will be operating commuter rail in this location shortly. The addition of commuter rail widens the Crossing, increases train volume, and places freight trains and commuter trains, operating at different speeds in the Crossing, potentially at the same time. Public use of an at-grade crossing with these characteristics potentially subjects Union Pacific to increased claims. In addition, public safety demands that a careful and accurate determination be made whether the Crossing is public or private. The evidence, as measured against the applicable standards,

indicates that the Crossing is private. For the reasons set forth above, Union Pacific respectfully requests that the Commission grant Union Pacific's petition and find that the Crossing is private.

DATED this 3rd day of August, 2010.

A handwritten signature in black ink, appearing to read "Reha Kamas", written over a horizontal line.

Reha Kamas
Attorneys for Union Pacific

Certificate of Service

I hereby certify that on the 3rd day of August, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys ^{by e-mail} ~~in the manner indicated below:~~

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Addendum D4

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Administrative Law Judge
Ruben Arredondo

Attorneys for Union Pacific Railroad Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

UNION PACIFIC RAILROAD
COMPANY'S AMENDED STATEMENT
OF UNDISPUTED AND DISPUTED
FACTS

Docket No. 09-888-01

In support of its petition, Union Pacific submits this Pre-hearing Statement of Undisputed and Disputed Facts related to the railroad grade crossing at 400 North in Vineyard, Utah, that is the subject of this dispute (the "Crossing"). Union Pacific reserves the right to supplement and/or amend this Statement before the hearing on this matter.

Undisputed Facts

The following relevant facts are not in dispute:

1. Union Pacific's predecessor, the Denver & Rio Grande Railroad, acquired the right of way in the area of the Crossing by deed dated 1881 from private property owner Stagg.
2. The right of way extended fifty feet on either side of the center line of the Union Pacific track.
3. At some point between 1881 and 1942, 400 North came to cross Union Pacific's


right of way at grade.

4. On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North.
5. The Resolution and Order vacated and abandoned the north half of 400 North on the west side of the Crossing and going over the Crossing. And 400 North was vacated and abandoned in its entirety at the Defense Plant Corporation property line on the east side of the Crossing.
6. Shortly after the Resolution and Order was passed, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing.
7. A gate was installed there to provide access, and the gate served for the next approximately sixty years to control access to the steel mill site.
8. Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005.
9. The gate closing off what was once 400 North on the east side of the Crossing was closed when Anderson Geneva began work on the development and remained closed until it was re-opened during the pendency of this action.
10. The Crossing was reconfigured by operators of the steel mill in the 1970s or 1980s.
11. Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day.

Disputed Facts

1. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, what had been 400 North was used on the east side of the Crossing as access for the employees and other business invitees of operators of the steel mill as access to a parking lot.
2. No public entity has conducted maintenance on the Crossing since 1942.
3. There is no evidence that any requests have been made by anyone to enter the Union Pacific right of way to perform maintenance.
4. There were no pavement markings or advanced warning signs on the west side of 400 North at the time this dispute arose.
5. There is no evidence that, when the Crossing was reconfigured by operators of the steel mill in the 1970s or 1980s, it was done with the knowledge of or permission from Union Pacific or any municipality.
6. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

DATED this 16th day of August, 2010.



Reha Kamas
Attorneys for Union Pacific

Certificate of Service

I hereby certify that on the 16th day of August, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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Addendum D5

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UTAH PUBLIC
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2010 SEP 16 P 12: 20

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**UNION PACIFIC RAILROAD
COMPANY'S POST-HEARING
POSITION STATEMENT**

Docket No. 09-888-01

At issue in this case is the status of an at-grade rail crossing at the location where 400 North crosses the Union Pacific and UTA right of way in Vineyard, Utah (the "Crossing"). The Utah Department of Transportation, reversing an earlier decision, has determined that the Crossing is a public crossing. Union Pacific challenges that conclusion and asks the Commission to find that the Crossing is a private crossing. The Commission held a two-day evidentiary hearing on August 17 and 18, 2010. In support of its petition, Union Pacific now submits this Post-hearing Position Statement.

Factual Background

At the location of the Crossing, Union Pacific's predecessor, the Denver & Rio Grande Western Railroad, acquired the right of way by deed dated 1881 from private property owner

Stagg. The right of way extends fifty feet on either side of the center line of the Union Pacific track.

At some point, 400 North came to cross Union Pacific's right of way at grade. To date, no documents have been located that reveal a legal arrangement by which this road became an authorized crossing of Union Pacific's right of way. Trans. of Hrg., Aug. 17-18, 2010, Vol. II ("Trans. Vol. II") at 20. Nor have any documents been found that reveal a dedication or other indication of the origin of the road. *Id.*

On August 3, 1942, the County Commissioners of Utah County passed a Resolution and Order vacating portions of 400 North and giving title to property on the north and east sides of the Crossing to the Defense Plant Corporation, predecessor of Geneva Steel, for the construction of a steel mill. See UP/UDOT Joint Ex. 72. The Resolution and Order stated: "It further appearing that certain county roads traverse said plant site, which roads are no longer needed for use by the general public or freeholders living with the vicinity of said plant site, and that it is advisable that such county roads be vacated and abolished, and that Utah County quitclaim said plant site to the said Defense Plant Corporation." *Id.*

Specifically, 400 North was vacated and abandoned to the section line on the west side of the Crossing and going over the Crossing. Trans. Vol. II at 19. In addition, 400 North was vacated and abandoned in its entirety on the east side of the Crossing at Union Pacific's east right of way boundary, which was also established as the Defense Plant Corporation's west property line. *Id.*

At this time, the steel mill property was fenced, with the fence extending across what was once 400 North on the east side of the Crossing. A gate was installed there and served for the next approximately sixty years to control access to the steel mill site. Beyond the gate was a parking lot. At the entrance to the parking lot was a guard shack. From the date the steel mill became operational in the 1940s until it ceased operation in the 1980s, 400 North beyond Vineyard Road (which runs parallel to the railroad tracks on the west side of the Crossing) was used solely as access for the employees and other business invitees of operators of the steel mill.

Anderson Geneva acquired the property on the east side of the Crossing on December 23, 2005. Anderson Geneva closed the gate on the east side of the Crossing when it began work on the development and the gate remained closed until it was re-opened during the pendency of this action.

Union Pacific's tracks are active at this Crossing. Freight traffic over the Crossing is approximately eight to twenty trains per day. When the UTA commuter rail project is completed, commuter rail traffic is estimated to be sixty trains per day.

Standards

Standards have been established that should be applied to determine whether an at-grade highway-rail crossing is public or private. UDOT's Chief Engineer, Eric Cheng, agreed that the following standards are the proper standards applicable to this decision in this case. Trans. Vol. II at 179-80. Mr. Cheng also testified that it is his opinion that application of the following standards indicates that the Crossing at issue here is private. *Id.* at 181.

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“A crossing shall be classified as public if, and only if, the roadway is deemed a *public road* in accordance with 23 CFR Part 460.2.” Private Highway-Rail Grade Crossing Safety Research and Inquiry at 3, UP/UDOT Joint Ex. 70. The Manual on Uniform Traffic Control Devices “defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing.” *Id.*

Similarly, the National Highway-Rail Crossing Inventory Instructions and Procedures Manual states that a “public crossing” is “the location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public.” The Instructions and Procedures Manual for the Federal Railroad Administration Highway-Rail Crossing Inventory Data Maintenance Program (“FRA Manual”) at 1-5, UP/UDOT Joint Ex. 16. Under the Code of Federal Regulations, “maintenance” means “preservation of the entire highway, including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization.” 23 C.F.R. § 460.2(d).

Further, under the Code of Federal Regulations, a public street or highway is “any road under the jurisdiction of and maintained by a public authority and open to public travel.” 23 C.F.R. § 460.2(a). A street or highway is “open to public travel” when it is “available, except

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during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight or class of registrations.” *Id.* § 460.2(d).

“If the primary function of the road is to provide public access to a publicly owned facility for the principal purpose of on-site use by the public, then the facility may be deemed a logical terminus of a public roadway. . . . Thus, crossings which exist for the primary purpose of providing public access to publicly owned and operated facilities such as fairgrounds, parks, schools, libraries, hospitals, clinics, airports, bus terminals, beaches, piers, boat launching ramps, recreational facilities, etc., which permit access to or invite use by the general traveling public would satisfy the definition ‘open to public travel,’ even if the entrance thereto is equipped with gates to effect seasonal or periodic closures (such as overnight), or limit access, or require an entry fee for use.” FRA Manual 1-6.

Therefore, “[i]n general, a roadway across railroad track for which both approaches are maintained by a public authority and which is open to the public is considered a ‘public’ crossing. These are roadways that are part of the general system of public streets and highways. Some jurisdictions accept a crossing as ‘public’ when only one approach is publicly maintained. If a public authority accepts a crossing as ‘public,’ it is a public crossing. *All others are considered ‘private.’*” FRA Manual at 1-6 (emphasis added).

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A "private crossing is one that is on a private roadway which may connect to part of the general system of public streets and highways but is not maintained by a public authority. Usually, it is a crossing where the property on both sides *or at least one side* of the railroad tracks is private property. It may also be on a roadway that is publicly owned but which is either restricted or not intended for use by the general public. *Private crossings are generally intended for the exclusive use of the adjoining property owner and the property owner's family, employees, agents, patrons and invitees.* Crossings are classified as private where the normal need or use is for residential, farm, recreation/cultural, industrial or commercial activities." FRA Manual 1-7 (emphasis added).

Analysis

The Crossing at issue here does not meet the definition of a public crossing, and is therefore private.

A. Under applicable standards, the Crossing is private

1. The Crossing leads to private property and has not been used by the public at least since 1942

UDOT's Chief Engineer, Eric Cheng, agrees that, under the only applicable standards, the Crossing is private. This fact was apparent to Mr. Cheng as soon as he saw the Crossing. Trans. Vol. II at 131. Mr. Cheng's opinion should be given great weight in light of his position and experience. Further, his opinion that the Crossing is private is more reliable because it is based on objective facts and criteria, whereas UDOT's later acceptance of the Crossing as public was based on other considerations.

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400 North leads into private property. The property is fenced and has a gate at the entrance that has been locked at various times. The fence bears a "No Trespassing" sign. UP/UDOT Joint Ex. 154. Mr. Cheng, testified, referring to the photo at UP/UDOT Joint Ex. 154, "I think everyone would agree with me, if you see this, you know this is a private crossing. And based on my prior knowledge, if the road goes to a private property, it's a private crossing." Trans. Vol. II at 129. Again, Mr. Cheng testified that, in his own personal opinion as an engineer, exercising engineering judgment, he believes the Crossing is private. *Id.* at 164. Mr. Cheng also testified that, while he has reviewed hundreds of crossings, he has never seen a *public* crossing that goes into private property and is gated. *Id.* at 130.

For the Crossing to be public, the roadway on either side must be a public roadway. The Crossing has not been open to public travel since the property on the east side was quitclaimed to Defense Plant Corporation on August 10, 1942. The 1942 Resolution and Order recognized that the general public no longer needed access to the steel mill property. At that time, a gate was placed and the road was no longer open to public travel. The east side of the Crossing enters the mill property and was used by steel mill owners as an entrance to the mill for employees and others. As Mr. Cheng testified, "[P]ublic road means open to the *general* public. *General*. I think that's the key word." Trans. Vol. II at 163 (emphasis added). The Crossing has not been open to the *general* public since 1942.

Since closure of the steel mill, the Crossing has seen little traffic. In fact, the current landowners, Anderson Geneva, have placed a fence at or near the property line and have blocked

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off the road entering the property. The fence has been in place since some time in 2005. Therefore, the crossing has been closed to the public for approximately 67 years. It enters a "privately-owned roadway[] utilized only by the owner's licensees and invitees."

2. Even if a public right of way exists, it does not extend through the Crossing

Further, whether or not any part of 400 North was located north of the section line in 1942 when the steel mill property was vacated and abandoned to that section line, there is not a public right of way today that extends all the way through the Crossing. Trans. Vol. II at. The Crossing was reconfigured in the 1970s. Even if there was a public right of way extending over the Crossing before the reconfiguration, the reconfiguration relocated the Crossing in such a way as to move it off the public right of way, either substantially or totally. Any public right of way that remains in the Crossing does not extend all the way over the Crossing from the west side to the east side. Trans. Vol. II at 36, 38, 42-43, 86, 115-18; UP/UDOT Joint Ex. 134.

Anderson Geneva suggests that 400 North, at the time of the vacation in 1942, was located well south of the section line, and well south of where 400 North is located presently. Union Pacific's expert, William L. Clark, investigated the site and found no evidence that a road ever existed south of the current location of the road. Trans. Vol. II at 31-35, 83.

Further, if 400 North were located in 1942 in the area where Anderson Geneva suggests, the 1970s relocation and reconfiguration of the Crossing would have removed the Crossing completely off of the former public right of way. This would have resulted in an interruption of the continuous use of the public right of way. If the 1970s relocation of the Crossing removed

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the Crossing completely away from the former public right of way, the former right of way is no longer paved but crosses Union Pacific's railroad tracks in the grass south of the Crossing.

Trans. Vol. II 60, 118. If the public right of way is now located in the grass, the public obviously has not been using this unpaved swath of land to traverse Union Pacific's private property.

The former public right of way was not deeded or dedicated. Therefore, it was acquired, if at all, by implied dedication through use. However, if the Crossing was relocated away from the former public right of way, public use has been interrupted. Under Utah law, "[a]n overt act that is intended by a property owner to interrupt the use of a road as a public thoroughfare, and is reasonably calculated to do so, constitutes an interruption sufficient to restart the running of the required ten-year period under the Dedication Statute." *Wasatch County v. Okelberry*, 226 P.3d 737, 742 (Utah Ct. App. 2010) (quoting *Wasatch County v. Okelberry*, 179 P.3d 768 (Utah 2008)).

Union Pacific has been using its private property in this area continuously since the 1970s. Trans. Vol. II at 60-61. The property is used as a railroad corridor and Union Pacific's tracks are active in this area. Freight traffic is eight to twenty trains per day. Union Pacific recently sold the westernmost twenty feet of its right of way to UTA for commuter rail construction. Trans. Vol. II at 13-14. Further, Union Pacific has not provided a means for the public to cross its railroad tracks safely in the grassy area south of the Crossing. Union Pacific has reasserted its private property rights. At this point, a public right of way can be reestablished

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only by deed, dedication, or implied dedication, which would require a new ten-year period of uninterrupted use. None of these circumstances has occurred. Therefore, any public right of way has terminated

3. No public entity has conducted maintenance

Lack of public maintenance also indicates that the Crossing is private. There is no evidence that the Crossing has been maintained by a public agency—on either side of the railroad tracks. There have been no pavement markings at the Crossing since at least 1970. Trans. Vol. II at 311. Public maintenance is required if the road traversing the Crossing is to be considered a public road. UDOT's Chief Engineer, Eric Cheng, testified to the critical importance of public maintenance to a determination that a crossing is public. Trans. Vol. II at 165. Anderson Geneva's proffered expert, Scott Hendricks, testified that his search revealed no evidence of public maintenance at the Crossing. *Id.* at 304-05. Since there is no evidence that public maintenance has not been performed on the approaches to the Crossing, the road over the Crossing cannot be considered public. If the road over the Crossing is not public, the Crossing is not public.

4. UDOT's decision that the Crossing is public is not based on applicable standards and should not be upheld by the Commission

For all of these reasons, the Crossing is a private crossing under the applicable standards.¹ UDOT's Chief Engineer, Eric Cheng, testified that UDOT's decision that the Crossing is public

¹ The testimony of Scott Hendricks on whether the Crossing is public or private should not be given any weight by the Commission. Mr. Hendricks had never, until this case, had occasion to

was not based on application of standards, but was a compromise. Trans. Vol. II at 143, 165-66. The compromise was “[d]esigned to take into consideration the conflicting interests of the Railroad and the developer.” *Id.* at 181. The compromise also was intended to protect the Town of Vineyard’s “possible future need for access at [the] point where the crossing is.” *Id.*

Importantly, Mr. Cheng testified that UDOT *accepted* that the Crossing was public and *considered* the Crossing to be public, rather than *concluded* or *decided* that the Crossing was public. *Id.* at 191-92. In fact, Mr. Cheng testified that while he *accepted* that the Crossing was public, he did not *agree* that the Crossing was public. *Id.* at 191. Instead, Mr. Cheng testified repeatedly that he believes the Crossing is private, and that application of the appropriate standards led him to this conclusion. *Id.*, e.g., at 129-30, 131-32, 179-80. When asked whether legal issues surrounding the road and the Crossing affected UDOT’s decision, Mr. Cheng testified: “Yeah. Because that is, that is basically the City—or Geneva-Anderson’s side. Your, your supporting information. But on the engineering side, on the Railroad side, you know, the definition, all—everything, I’m sorry, I have to say I support—that it’s a private crossing.” *Id.* at 194.

consider the question whether a railroad crossing was public or private. He testified that, until this case, his “exposure to private crossings was limited to reading road signs.” Trans. Vol. II at 297. He was totally unfamiliar with the applicable standards until he was asked to read them for his work on this case. When asked whether he knew how “individuals who actually, as part of their job, have to figure out whether a crossing is public or private might use those manuals” containing the relevant standards, he answered, “That’s really not for me to say. I mean, that’s not my purview. My purview as an engineer is to design roadways.” *Id.* at 299. Mr. Hendricks’ opinion that the Crossing is private goes beyond his admitted purview. He is not qualified to give an opinion on this subject and the Commission should disregard his testimony.

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5. A ruling that the Crossing is private comports with federal safety policy

The Federal Railroad Administration has made recommendations concerning crossing closure. Trans. of Hrg., Aug. 17-18, 2010, Vol. I (“Trans. Vol. I”) at 81. Specifically, the FRA recommends closure of twenty-five per cent of all active crossings in the United States. *Id.* The initiative is aimed at improving public safety, and it is an initiative that Union Pacific supports. *Id.* at 81-82. As at-grade railroad crossings have been closed, there has been a reduction in vehicular crossing accidents on Union Pacific’s system. *Id.* at 84.

Safety is Union Pacific’s primary concern. The Crossing is private. In the interest of public safety, and in accordance with the federal policy supporting crossing closures to reduce incidents at highway-rail grade crossings, the Crossing should be closed.

B. The FRA database does not serve as notice to developers of the status of a crossing

Union Pacific acknowledges that the Crossing has been categorized as public in the FRA database. However, as UDOT’s Chief Engineer, Eric Cheng testified, the FRA database was never intended to be used or relied upon by a private developer such as Anderson Geneva. Trans. Vol. II at 169. The National Highway-Rail Crossing Inventory Data File is maintained by the Federal Railroad Administration (“FRA”) “*for use by States and railroads.*” FRA Manual at 1-1. Further, there is no legal support for the argument that Union Pacific’s contributions of information to a federal database can be construed as representations to every member of the public, and may be enforced under the doctrine of equitable estoppel.

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The FRA database (formally named the National Highway-Rail Crossing Inventory Data File) arose out of a 1972 report of the United States Department of Transportation to Congress, which was aimed at providing recommendations “for alternative courses of action which would lead to a significant reduction in accidents, fatalities, personal injuries and property damage at highway-rail crossings. The report recommended the development of an adequate information system.” *Id.*

The FRA “entered into a contract with the Association of American Railroads to develop a ‘Comprehensive National Highway-Rail Crossing Information and Numbering System.’ The project was established as a cooperative effort between all the nation’s railroads and the U.S. Department of Transportation” *Id.* at 1-2 to 1-3.

Under the contract, the “railroad companies, with direction and guidance from the Association of American Railroads and the American Short Line Railroad Association, were assigned the responsibility for making a site-specific inventory of each highway-rail crossing and for installing a unique identifying number at each location. The railroads were also identified as being responsible for periodic update of certain inventory information and maintenance of the crossing number.” *Id.* at 1-3. It is, therefore, inaccurate to state that Union Pacific has a statutory obligation with respect to the database.

Importantly, the FRA maintains two data files, the Inventory Data File and the Accident Data File. “Routinely, the highway-rail crossing accident data is integrated with inventory data and the information from the combination is used for the development of Federal programs,

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funding alternatives for crossing improvement, studies related to railroad safety programs, effectiveness of warning devices, high-speed railroad corridors, accident costs, public awareness and driver training, and other safety program development and research opportunities.” Id. at 1-3 (emphasis added). The information is not used to communicate to the public the whether railroad crossings such as the one at issue here are public or private.

UDOT’s Mr. Cheng testified that he agreed with Union Pacific’s foregoing analysis of the purposes and limitations of the FRA database. Trans. Vol. II at 171. Mr. Cheng testified that the purpose of the FRA database is to promote safety. *Id.* at 169. He testified that it is not intended to be consulted by developers to determine private property rights or property access. *Id.* Moreover, as Mr. Cheng also testified, designation of a crossing as public or private in the FRA database can be incorrect. *Id.* at 137. Finally, as set forth above, the definition of a public crossing in the FRA database is consistent with Union Pacific’s analysis and conclusion that the Crossing is private.

Conclusion

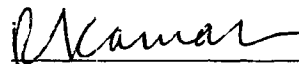
UTA will be operating commuter rail in this location shortly. The addition of commuter rail widens the Crossing, increases train volume, and places freight trains and commuter trains, operating at different speeds in the Crossing, potentially at the same time. Public use of an at-grade crossing with these characteristics potentially subjects Union Pacific to increased claims. In addition, public safety demands that a careful and accurate determination be made whether the Crossing is public or private.

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The evidence, as measured against the applicable standards, indicates that the Crossing is private. A ruling by the Commission that the Crossing is private does not foreclose any party's ability to seek access over the rails at 400 North, including Anderson Geneva and the Town of Vineyard. Trans. Vol. I at 85; Trans. Vol. II at 175. A party seeking access would simply have to follow the proper process as determined by UDOT. *Id.*

For the reasons set forth above, Union Pacific respectfully requests that the Commission grant Union Pacific's petition and find that the Crossing is private.

DATED this 15th day of September, 2010.



Reha Kamas
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I hereby certify that on the 15th day of August, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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Addendum D6

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
 Petition for Relief against the Utah Department
 of Transportation

**Union Pacific Railroad's Responsive
 Post-hearing Position Statement**

Docket No. 09-888-01

Petitioner, Union Pacific Railroad Co., by and through counsel of record, respectfully
 submits this Responsive Post-hearing Position Statement.

INTRODUCTION

The parties have briefed this matter at length. As the dust settles here at the end, it all
 still comes down to answering just three questions:

1. What standards must one follow to determine whether a crossing is public or private?
2. What are the relevant facts regarding the history and current circumstances of the 400
 North crossing (the "Crossing")? and
3. When those facts are applied to the standards, is there substantial evidence to support
 UDOT's determination that 400 North is a public crossing?

Union Pacific's efforts throughout this proceeding have been to confront these questions
 directly because answering them leads to the unavoidable conclusion that whatever status this
 Crossing may have had at any other time in history, today this is—and for many years has been—

a private crossing, not a public one.

Respondents grasp at several arguments to try to distract the Commission from this outcome. For example, they argue that the FRA and MUTCD standards are merely engineering guidelines, not legal authorities to be relied upon. What they do not explain is why, even if this is true, the outcome would be affected. As very clearly established at the hearing, the standards that Respondents try to dismiss are actually the ones universally followed when determining the nature of a crossing. However else one wishes to characterize these standards, they are still the ones that matter.

UDOT's decision that the Crossing is public will stand if it was reasonable and rational. The point is that UDOT's decision fails these tests. Respondents consume pages of their brief listing their view of the facts. But it is the quality, not necessarily the quantity, of evidence that matters. After all, it can take as little as one piece of evidence to unequivocally establish a fact as true. But a pile of evidence as high as the moon would not necessary qualify as sufficiently substantive to support a reasonable and rational decision. Again, as Union Pacific has already fully briefed, when one applies the evidence here to the standards to be followed, the outcome leads unavoidably to the conclusion that this Crossing is private.

On this same point, Respondents seem to want to have their cake and eat it too. They criticize UDOT for ordering the Crossing to be temporarily closed on the basis that UDOT did not follow correct procedures. But they insist that the same allegedly flawed process reached the right conclusion about the Crossing being public. They cannot have it both ways. Focusing solely on a desired outcome without genuine regard for process or standards is the very definition

of acting arbitrarily. UDOT's departure from its original conclusion to try to appease parties rather than applying and following standards shows such arbitrary action.

In short, the standards are clear. Of course there are facts on both sides of the issue. But when those facts are applied to the standards, it is plain that the evidence falls short of finding that 400 North is a public crossing. It is private, and has been for some time.

And again, as Mr. Cheng testified at trial, a finding that this is a private crossing does not mean that a public one could not be established here under proper circumstances. It simply means that the Crossing could be removed for now and the parties must start with a clean slate and a plan proposed through discussions and an application to UDOT for a public crossing.

ARGUMENT

A. UDOT's Determination that the Crossing Is Public Was Not Reasonable or Rational and Should Be Reversed

1. UDOT's determination must be reasonable and rational

In the Matter of an Appeal to I Road Closure in Draper, the Commission noted the separate standards of review urged by the opposing parties. In its Post-hearing Brief, Anderson Geneva and Vineyard quote one of the standards. The other standard urged by the parties was "whether UDOT's decision was reasonable and rational." Report & Order, Docket No. 05-999-02 at 5 (May 27, 2005). Without further analysis, the Commission stated, "This approach appears reasonable and we therefore proceed accordingly." *Id.* Therefore, in this case, the Commission should determine whether UDOT's decision that the Crossing is public was reasonable and rational based on relevant and applicable engineering standards.

2. *Union Pacific relies on the proper standards necessary to a reasonable and rational determination*

There is no dispute that UDOT has the jurisdiction and authority to decide whether the Crossing is public or private. There also is no serious question that the standards cited and discussed by Union Pacific are the proper standards UDOT should apply to reach its determination. Based on his specialized knowledge and skill as the UDOT Chief Engineer, Mr. Cheng testified to the proper standards that should be applied to determine whether the Crossing is public or private. Trans. Vol. II at 179-80. In fact, Mr. Cheng testified that Union Pacific set forth the proper standards in its Amended and Supplemental Pre-Hearing Position Statement, and that he agreed with the conclusion reached by Union Pacific in applying these standards. *Id.* at 181.

The standards may be characterized as “engineering standards” that do not, in and of themselves, decide legal rights. However, they are properly applied by UDOT and its Chief Engineer in the course of the exercise of UDOT’s statutory authority to determine whether an at-grade highway-rail grade crossing is public or private. UDOT’s exercise of this statutory obligation carries legal effect. Anderson Geneva & Vineyard challenge the standards but do not suggest alternatives, except to suggest that the determination is a legal one.¹

¹ Union Pacific notes that, despite Anderson Geneva’s and Vineyard’s protestations to the contrary, the MUTCD definition of a public road quoted on pages 23 and 24 of Anderson Geneva’s and Vineyard’s Post-hearing Brief are identical. The only difference is that the MUTCD definition quoted in the Private Highway-Rail Grade Crossing Safety Research and Inquiry is followed by additional information. Further the 1971 MUTCD definition still incorporates two definitional components, public travel and public maintenance. Anderson Geneva and Vineyard’s Br. at 25. It is undisputed that the steel mill was not open to the *general* public, and there is no evidence of public maintenance.

3. *The road on the east side of the Crossing was closed to public travel starting in 1942*

It is undisputed that the public road on the east, or Geneva, side of the Crossing was vacated and abandoned in 1942. Trans. Vol. II at 19. After that time, the Crossing was not open to the *general* public, but was used as an access to private commercial property. See Union Pacific's Post-hearing Position Statement, Section A(1); Trans. Vol. II at 163. For this reason, the interpretive letter discussed by Anderson Geneva and Vineyard is irrelevant. Anderson Geneva's and Vineyard's Post-hearing Br. at 24-25. That interpretive letter discusses circumstances that are not present here. The steel mill was not a shopping center or similar business where the public had reason to go. It was not an office park open to the public. Therefore, the letter adds nothing to the analysis.

4. *There is no evidence of public maintenance*

Anderson Geneva and Vineyard's assertion that Utah County and/or Vineyard maintained the Crossing is unsupported by the evidence. Anderson Geneva & Vineyard Post-hearing Br. at 15. In fact, at no time until this matter was raised before the Commission did Vineyard take any affirmative action in an effort to "accept" the crossing. Even now, there is no evidence that Vineyard has done any more than make verbal representations in its filings before the Commission. Anderson-Geneva & Vineyard's Post-hearing Brief at 8, ¶ 17.

Visualizing layers of asphalt alone is not enough to determine who conducted maintenance. This is the only evidence related to maintenance. And Mr. Hendricks, Anderson Geneva's expert, found no evidence of public maintenance whatsoever. Trans. Vol. II at 304-05. The absence of evidence that a public entity performed maintenance compels the conclusion that

the maintenance issue must be decided in favor of finding that the Crossing is private.

5. *UDOT admits that application of the proper standards results in the conclusion that the Crossing is private*

Eric Cheng, UDOT's Chief Engineer, testified that the standards set forth by Union Pacific are the appropriate, applicable standards that should be applied to determine whether an at-grade railroad crossing is public or private. Trans. Vol. II at 179-80. Mr. Cheng further testified that application of the relevant standards leads to the conclusion that the Crossing is *private*. Trans. Vol. II at 129, 131, 164. It is undisputed that UDOT's decision that the Crossing is public was not based on application of any standards. Instead, it is undisputed that the decision was the product of an effort to find a compromise position that would address the disparate interests of Union Pacific, the Town of Vineyard, and Anderson Geneva. Trans. Vol. II at 143, 165-66, 181.

6. *UDOT effectively has abandoned its determination that the Crossing is public*

Perhaps most persuasive and telling of all, UDOT makes absolutely no effort in either of its post-hearing briefs to support or defend its prior determination that the Crossing is public. UDOT's silence unmistakably signals the correctness of the conclusion that the Crossing is private. UDOT's determination to the contrary was not reasonable or rational and must be reversed.

B. The Crossing Was Relocated Away from the Former Public Right of Way

A legal analysis also results in the conclusion that the Crossing is private because it is no longer located on a public right of way. The combined effect of the 1942 Resolution and the subsequent reconfiguration of the Crossing was to move some or all of the Crossing off of the

former public right of way. See Union Pacific's Post-hearing Position Statement, Section A(2); Trans. Vol. II at 36, 38, 42-43, 86, 115-18; UP/UDOT Joint Ex. 134. While it is true that safety upgrades alone do not change ownership, the Crossing was not only upgraded but *relocated* in such a way that, at most, it was removed from the former public right of way entirely, and at least, the former public right of way no longer extended all the way through the Crossing.

C. Use of the Public Right of Way Was Interrupted

In response to Point 3 of Anderson Geneva and Vineyard's Post-hearing Brief, Union Pacific incorporates by reference as if fully set forth herein Section A(2) of its Post-hearing Position Statement.

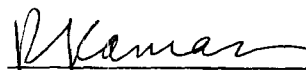
D. Res Judicata and Estoppel Do Not Apply

In response to Points 4 and 5 Anderson Geneva and Vineyard's Post-hearing Brief, Union Pacific incorporates by reference as if fully set forth herein Sections B and C of its Amended and Supplemental Pre-hearing Position Statement.

CONCLUSION

For the reasons set forth above, and in Union Pacific's pre-hearing and other post-hearing filings, Union Pacific urges the Commission to rule that UDOT's determination that the Crossing is public was not reasonable or rational and must be reversed.

DATED this 29th day of September, 2010.



Reha Kamas

Attorneys for Union Pacific

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

Union Pacific Railroad Company's
Supplemental Submission Regarding
Standard of Review

Docket No. 09-888-01

Petitioner, Union Pacific Railroad Co. ("Union Pacific"), by and through counsel of record, respectfully submits this Supplemental Submission Regarding Standard of Review, pursuant to the Utah Public Service Commission's (the "Commission") October 20, 2010, Interim Order.

ARGUMENT

Union Pacific limits its response to the scope of the Commission's jurisdiction and discretion to review the decision of the Utah Department of Transportation ("UDOT") that the railroad-grade crossing at 400 North in Vineyard, Utah (the "Crossing"), is public. Union Pacific does not comment on whether UDOT is owed deference with respect to its interpretation of rules that might relate to temporary closure of railroad crossings, or with respect to its decision that the Crossing was unsafe.

1. Under the Legislature's Broad Grant of Jurisdiction and Discretion, the Commission Has Authority to Determine If UDOT's Decision Was Correct

The relevant statutory grant of jurisdiction and discretion to the Commission is broad and without exception and supports a *de novo* standard of review. The state appellate courts have jurisdiction to review "all final agency action resulting from formal adjudicative proceedings." Utah Code Ann. § 63G-4-403. When a decision of the Commission resulting from a formal adjudicative proceeding is appealed, the Utah Administrative Procedures Act ("UAPA") provides that:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) *the agency has acted beyond the jurisdiction conferred by any statute;*
- (c) the agency has not decided all of the issues requiring resolution;
- (d) *the agency has erroneously interpreted or applied the law;*
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) *the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;*
- (h) the agency action is:
 - (i) *an abuse of the discretion delegated to the agency by statute;*

- (ii) contrary to a rule of the agency;
- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious.

Id. (emphasis added).

The standard of review that would be applied by an appellate court on appeal sheds some light on the scope of the Commission's decision making power under Section 54-4-15 of the Utah Code. As the UAPA makes clear, the Commission must act within the jurisdiction and discretion conferred upon it by statute. Further, it must correctly interpret and apply law, and its factual findings must be supported by substantial evidence.

First, the Commission must act within the jurisdiction and discretion conferred upon it by the applicable statute. In this case, the applicable statutory grant of jurisdiction and discretion to the Commission is broad. Under Section 54-4-15 of the Utah Code, the Commission "retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department [of transportation] pursuant to this section" This is broad language that does not include any exceptions or limitations. It indicates the intent of the Legislature to grant to the Commission all power and authority necessary to resolve any dispute brought by a person aggrieved by an action of UDOT.

Second, the Commission must correctly and consistently interpret and apply law. This requirement necessarily implies that the Commission has the power to make legal conclusions. There is no indication in Section 54-4-15 that the Commission should defer to UDOT's conclusions of law. Thus, the Commission has the power to determine the proper legal standards

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that should be applied to resolve the instant dispute, and to interpret and apply those standards, without regard for any legal conclusions UDOT may have made.

In deciding that the Crossing is public, UDOT did not apply or interpret any of its own rules. Instead, testimony at the hearing showed that UDOT agrees that the standards and guidelines set forth by Union Pacific are the appropriate standards and guidelines that should be followed to determine whether the Crossing is private or public. These standards and guidelines were not promulgated by UDOT, or by the Legislature for UDOT's interpretation and application. Therefore, any question as to whether UDOT's interpretation of its own rules should be given deference is not applicable to the decision whether the Crossing is private or public.

Finally, the Commission's factual findings must be supported by substantial evidence in the record before the Commission. Importantly, this requirement is focused on the facts in the record created by the proceedings before the Commission, including the hearing. It is not focused on the facts as found by the agency whose decision the Commission is reviewing. Accordingly, the plain language of the UAPA makes clear that the Commission has authority to hear evidence and to make findings of fact based on substantial evidence in the record. There is no indication that the Commission is obligated to defer to the factual determinations of the agency whose decision is being reviewed. Thus, in this case, the Commission is not obligated to defer to any factual determinations UDOT made in the course of deciding that the Crossing is public.

Under the UAPA, then, within the scope of the jurisdiction and discretion granted to it by the Legislature, the Commission's decision will not be overturned if it correctly and consistently interprets and applies law, and if its factual findings are supported by substantial evidence in the

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record. Because Section 54-4-15 contains no exceptions or limitations, there is no support for the conclusion that the Commission owes deference either to UDOT's legal determinations or to its factual determinations. Instead, under Section 54-4-15, the Commission has the power and authority necessary to resolve disputes.

The Commission's decision In the Matter of an Appeal to I Road Closure in Draper appears to be the authority most closely on point. That decision addressed a railroad-grade crossing closure. It did not, however, consider the effect of the precise grant of jurisdiction and discretion contained in Section 54-4-15, or the light shed on the Commission's authority by the UAPA. In its decision, the Commission noted separate standards of review urged by the opposing parties. The Commission rejected the proposed "arbitrary and capricious" standard of review and applied a "reasonable and rational" standard of review. Report & Order, Docket No. 05-999-02 at 5 (May 27, 2005).

After the further research ordered by the Commission, Union Pacific believes that the Commission has authority to determine whether UDOT's decision that the Crossing is public was *correct*. Aside from the Commission's decision in the Draper crossing closure case, there appears to be no support for a more limited interpretation of the Commission's authority. Likewise, there appears to be no support for the conclusion that the Commission owes any degree of deference to UDOT. However, with due respect for the Commission's own precedent, it appears that, if a *de novo* standard is not applied, no more deferential standard than the "reasonable and rational" standard should be. In other words, while the Draper decision constitutes some authority for application of a "reasonable and rational" standard of review, there is no support for the more deferential "arbitrary and capricious" standard of review, since that standard was rejected in the Draper decision.

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2. *Under Any Standard of Review, UDOT's Determination that the Crossing Is Public Should Be Reversed*

The Commission should reverse UDOT's decision no matter what standard of review it applies. UDOT's determination that the Crossing is public is neither correct nor reasonable and rational.

UDOT's decision that the Crossing is public is not legally correct. The Utah Supreme Court held in *Bamberger Electric R. Co. v. Public Utilities Commission of Utah* that "the real test of whether a roadway or crossing is private or public consists in that any one of the public having the right of passage may compel its remaining open and unobstructed." 204 P. 314, 319 (Utah 1922). It is undisputed that the public road on the east, or Geneva, side of the Crossing was vacated and abandoned in 1942. Trans. Vol. II at 19. After that time, the Crossing was not open to the *general* public, but was used as an access to private commercial property. See Union Pacific's Post-hearing Position Statement, Section A(1); Trans. Vol. II at 163. UDOT's decision that the Crossing is public, therefore, fails the "real test." Since 1942, no member of the public has had the right to compel the road into the Geneva plant site to remain open and unobstructed.

This is made clear by the undisputed fact that the property has been fenced and has had a gate at the entrance bearing a "No Trespassing" sign that has been locked at various times. UP/UDOT Joint Ex. 154. UDOT's Chief Engineer, Eric Cheng, testified, referring to the photo at UP/UDOT Joint Ex. 154, "I think everyone would agree with me, if you see this, you know this is a private crossing. And based on my prior knowledge, if the road goes to a private property, it's a private crossing." Trans. Vol. II at 129. This conclusion is consistent with the *Bamberger* case.

Further, UDOT's decision was not reasonable and rational. Mr. Cheng testified that the standards set forth by Union Pacific are the appropriate, applicable standards that should be

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applied to determine whether the Crossing is public or private. Trans. Vol. II at 179-80. Mr. Cheng further testified that application of the relevant standards leads to the conclusion that the Crossing is *private*. Trans. Vol. II at 129, 131, 164. It is undisputed that UDOT's decision that the Crossing is public was not based on application of any standards. Instead, the decision was the product of an effort to find a compromise that would address the disparate interests of Union Pacific, the Town of Vineyard, and Anderson Geneva. Trans. Vol. II at 143, 165-66, 181. A decision contrary to applicable standards made for political exigency is not reasonable and rational and cannot stand.

CONCLUSION

The Commission should determine whether UDOT's decision that the Crossing is public was correct. However, under any standard of review, UDOT's decision, which is contrary to applicable standards, should be reversed.

DATED this 24th day of November, 2010.



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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**Union Pacific Railroad Company's Petition
for Rehearing and Stay**

Docket No. 09-888-01

Pursuant to Sections 54-7-15 and 63-6-401 of the Utah Code, Union Pacific Railroad Co.
("Union Pacific") seeks rehearing of the Report and Order of the Public Service Commission of
Utah (the "Commission"), entered February 7, 2011.

A. Grounds for Rehearing

Union Pacific seeks rehearing on the following two grounds:

- 1. UDOT does not have jurisdiction over the Crossing because 400 North is not a
"public road" at the point where it crosses the railroad tracks**

UDOT does not have jurisdiction over the Crossing at issue in this matter because 400
North Street in Vineyard, Utah, is not a public road at the point where it crosses Union Pacific's
tracks. The Commission ruled that, under Utah law, the Utah Department of Transportation
("UDOT") has "an explicit grant of authority over railroad crossings of *public roads or highways*
...." Feb. 7, 2011, Rep. & Order at 11 (emphasis added). Section 54-5-15(2) provides, with
emphasis, that

The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of *each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa*, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety

Accordingly, for UDOT to have jurisdiction, a road must cross railroad tracks, and the road must be a public road, meaning, it must be located on public right of way.

In this case, the road—400 North—is no longer located on public right of way. The Commission ruled that 400 North, at the point where it crosses Union Pacific’s tracks, is located only partially on public right of way, if at all. The Commission ruled: “There is no doubt the road and Crossing, *as they presently lie*, are either entirely or partly within the land that was vacated. They lie almost completely off the public ROW.” Feb. 7, 2011, Rep. & Order at 16 (emphasis in original). Nevertheless, the Commission ruled that, “despite the fact the Crossing and portion of 400 North . . . were reconfigured or shifted on the land previously abandoned, they were not abandoned or vacated originally by the 1942 Resolution, and were not abandoned or vacated by formal order thereafter. Therefore, its current placement has no effect on the legal nature of the Crossing today.” *Id.* at 16.

To the contrary, the current placement of 400 North determines whether UDOT has jurisdiction over the Crossing. The Commission ultimately ruled that “[t]he Crossing is public and so are all public thoroughfares remaining after the 1942 Resolution.” *Id.* at 18. However, because it was relocated, 400 North is not one of the “thoroughfares remaining after the 1942

Resolution.” UDOT’s jurisdiction is limited to *public roads*. Therefore, UDOT does not have jurisdiction over 400 North at the point where it crosses Union Pacific’s tracks.

Union Pacific urges the Commission to grant rehearing to reconsider UDOT’s statutory grant of authority as applied in this case in light of the Commission’s finding that “[t]here is no doubt the road and Crossing, *as they presently lie*, are either entirely or partly within the land that was vacated. They lie almost completely off the public ROW.” *Id.* at 16 (emphasis in original).

2. A public thoroughfare that crosses into private property should be considered a private crossing

The Crossing leads into property that has been private since 1942 and, therefore, should be considered private. The Commission ruled that “the Crossing and what is left of 400 North [i]s a bit of an oddity—a public thoroughfare that crosses into private property.” Feb. 7, 2011, Rep. & Order at 19. Relying on Utah law holding that real property designated for public use can only cease to be such by formal vacation, the Commission ruled that the Crossing is public. *Id.* at 20. However, the absence of a formal abandonment or vacation should not be given such decisive weight. Even if 400 North were a public thoroughfare, the Crossing still should be considered private. Union Pacific urges the Commission to grant rehearing to reconsider the proper weight to be given the absence of a formal order of abandonment or vacation in light of the many other relevant factors, including the factor that led the Commission to rule that, “[i]f viewing these engineering standards alone without considering the statutory and other legal provisions governing abandonment of public thoroughfares, it would seem the Crossing would be private.” *Id.* at 13.

B. Stay pending final agency action

Pursuant to Section 63G-4-405 of the Utah Code, Union Pacific petitions the agency to grant a stay of its February 7, 2011, Order pending agency review and any subsequent judicial review. A stay is necessary to prevent substantial improvements from being constructed and installed at the Crossing at UDOT's insistence when the Commission or a court may yet determine that UDOT does not have jurisdiction over the Crossing.

UDOT held a surveillance review of the Crossing on February 22, 2011. Then, on February 28, 2011, UDOT issued a Surveillance Report and Ruling directed to Utah Transit Authority. A true and correct copy of the February 28, 2011, Surveillance Report and Ruling is attached as Exhibit A. In its Ruling, UDOT ordered temporary closure of the Crossing until improvements are installed and constructed. Ex. A at 2. UDOT outlined substantial and costly improvements to be installed and constructed, and design work has begun.

Specifically, UDOT ruled that Vineyard Road must be realigned to the west because of safety concerns. *Id.* This will require road improvements on both the east and west sides of the Crossing. *Id.* Railroad lights, gates, and crossing panels are to be installed to match the new road alignment and improvements. *Id.* at 3. Standard railroad signage must be placed. *Id.* UDOT has ruled that UTA is responsible for installation of crossing panels, safety improvements, and signs. *Id.* However, UDOT has ruled that Union Pacific is responsible for the reinstallation of the east road approach to the Crossing. *Id.*

To prevent possibly unnecessary installation and construction of these improvements at the Crossing, Union Pacific urges the Commission to stay the February 7, 2011, Report and Order pending rehearing and possible subsequent judicial review.

DATED this 9th day of March, 2011.



Reha Kamas
Attorney for Union Pacific

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I hereby certify that on the 9th day of March, 2011, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

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